

TRANSMITTAL OF REPORT

FOR THE MONTH OF THE UNITED STATES

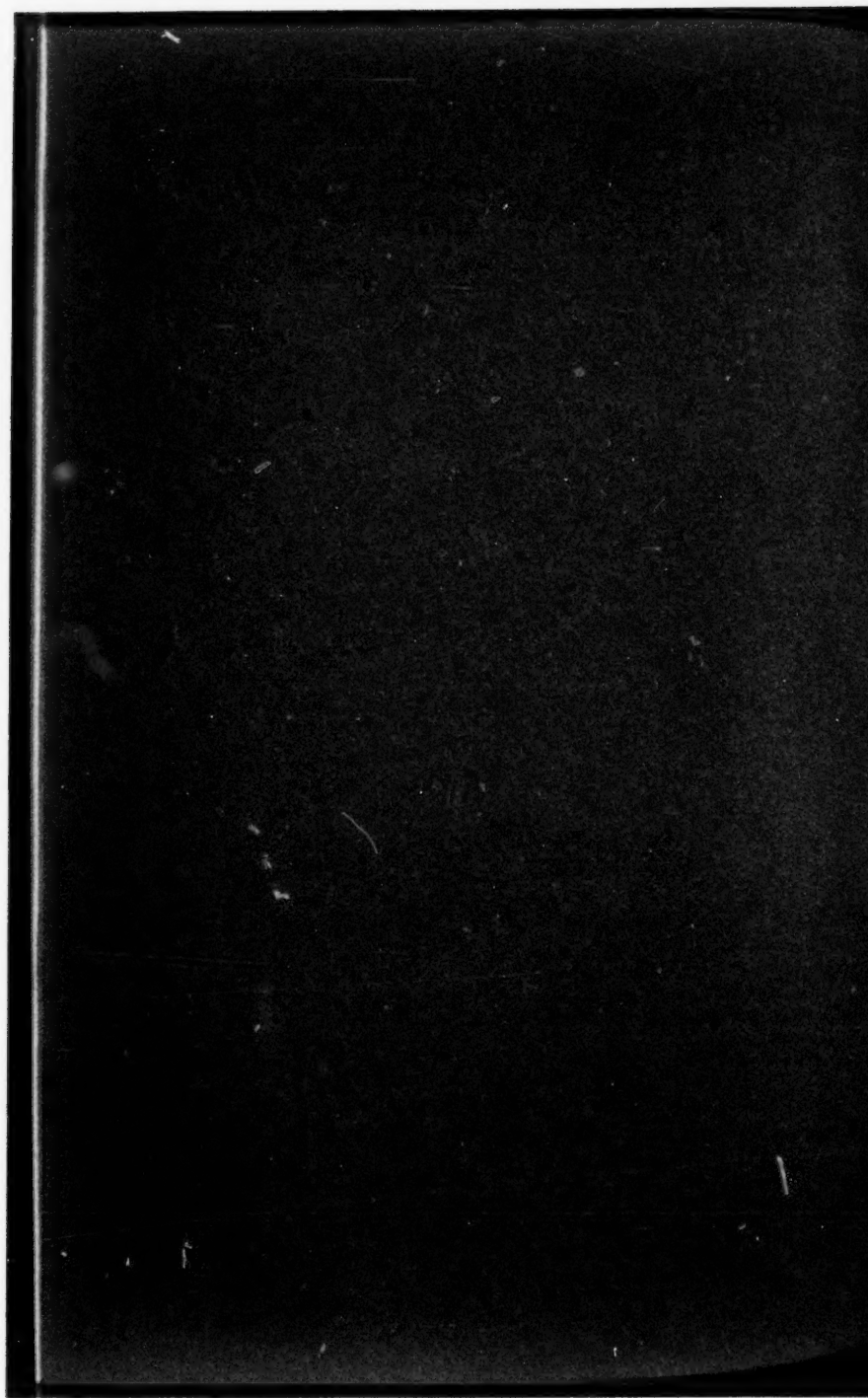
OF THE UNITED STATES

NO. 73

REPORT ON COMPANY OF THE UNITED STATES
OF THE UNITED STATES

GENERAL C. G. GARDNER, JR.

REPORT ON COMPANY OF THE UNITED STATES
OF THE UNITED STATES



(25,067)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 784.

THE HOUSTON OIL COMPANY OF TEXAS, KIRBY LUMBER
COMPANY, AND MARYLAND TRUST COMPANY, PETI-
TIONERS,

vs.

CORNELIA G. GOODRICH ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT
OF APPEALS FOR THE FIFTH CIRCUIT.

INDEX.

	Page
Caption	a
Transcript of record from the district court of the United States for the eastern district of Texas.....	1
Caption	1
Plaintiffs' original petition.....	2
Plaintiffs' first amended original petition.....	4
Interveners' original petition.....	7
Interveners' first amended original petition.....	9
Defendants' original answer to plaintiffs' original petition.....	11
Defendants' original answer to interveners' petition.....	16
Answer and cross-action of Texas Builders' Supply Company.....	22
Plaintiffs' supplemental petition.....	24
Interveners' supplemental petition.....	24
Plaintiffs' and interveners' supplemental petition.....	26
Judgment rendered December 2, 1912.....	26
Præcipe by plaintiffs and interveners for writ of possession and exe- cution under said judgment.....	30

	Page
Writ of execution and marshal's return thereon.....	31
Writ of possession and marshal's return thereon.....	34
Statement showing date of mandate and date filed in district court..	36
Defendants' motion for restitution.....	36
Order on motion.....	44
Defendants' amendment to motion for restitution.....	45
Defendants' second amendment to motion for restitution.....	46
Plaintiffs' and interveners' exceptions to motion for restitution....	49
Affidavit of forgery made by Charles T. Butler.....	50
Affidavits of forgery made by Thos. J. Baten and E. E. Easterling..	51
Affidavit of Charles T. Butler as to loss of certain deeds.....	53
Trial agreements	54
Bill of exceptions.....	62
Testimonio of original title to Charles A. Felder.....	63
Deed, Charles A. Felder to John A. Veatch, dated January 18, 1839	67
Testimony of John A. Walker.....	71
Deed, John A. Veatch to James Morgan, dated March 15, 1841	73
Deed, James Morgan to W. D. Lee, dated October 17, 1845..	76
Deed, W. D. Lee to Benjamin H. Green, dated September 25, 1846	79
Deed, Benjamin E. Green to Richard C. Washington, dated September 9, 1848.....	81
Deed, Richard C. Washington and wife to Wm. Walker, dated September 22, 1848.....	84
Testimony of A. L. Mayes.....	93
J. R. Bevil.....	95
Henry Ralph	104
T. B. Beaty.....	112
Deposition of Mrs. Nellie R. Lowe.....	117
David Rafferty	123
C. H. Rafferty.....	129
James D. Adams.....	134
O. B. Johnson.....	141
Mrs. Annie E. Snow.....	145
Record of deed from James Morgan to W. W. Swain, dated No- vember 21, 1844.....	155
Deed, W. W. Swain to Robert Rose, dated January 5, 1846.....	160
Deed, Robert Rose to John N. Rose, dated August 4, 1854.....	165
Deed, John N. Rose to William M. Goodrich, dated January 1, 1871	168
Index to deed records of Hardin county, Texas.....	171
Admission made in cause of Houston Oil Co. vs. Pollard.....	172
Deposition of Edward L. Montgomery.....	179
Deposition of Mary W. Montgomery.....	187
Abstract of title by H. M. Trueheart & Co.....	194
Will of Anna Louise Goodrich.....	208
Will of James Morgan.....	210
Testimony of Dr. E. S. Cox.....	212
Deposition of Mrs. Ellen Lee Mason.....	215
Testimony of T. E. Danziger.....	223

INDEX.

iii

	Page
Contract between Houston Oil Co. of Texas and Texas Builders Supply Co.....	225
Reports by Texas Builders Supply Co. of sand taken.....	245
Testimony of John H. Kirby.....	253
F. E. Helbig.....	288
R. E. Wall.....	291
H. M. Richter.....	308
Charles T. Butler.....	313
Horace Word.....	315
Deposition of T. J. Word.....	322
Proceedings in the district court of Hardin county in case of Gillette & Ball, executors, vs. Geo. F. Moore.....	330
Testimony of J. M. Cook.....	332
Testimony of Tom Sheffield.....	338
Record of deed from Charles Felder to William Daniel, dated June 10, 1839, recorded in Menard county.....	340
Deed, William A. Daniel, signed William Daniels, dated February 5, 1855.....	345
Record of deed, Charles F. Felder to Joshua Smith, dated May 21, 1840, recorded in Menard county.....	349
Deed, Joshua Smith to Mary E. Brown, dated February 27, 1850.....	354
Deed, Mary E. Frazier and husband to T. J. Word, dated January 19, 1855.....	356
Deed, R. O. Lusk to Thos. J. Word, dated October 5, 1855.....	356
Deposition of T. J. Word.....	359
Deed, Charles A. Felder to William A. Daniels, dated June 10, 1839.....	360
Deed, Charles F. Felder to Joshua Smith, dated May 21, 1840..	363
List of civil officers of Jasper county, Texas, years 1839 to 1842, inclusive, certified by Secretary of State.....	366
Testimony of J. J. Bevil.....	371
Deed, Thomas J. Word to Geo. F. Moore, dated December 8, 1858.....	374
Deed, Thomas J. Word to Susan Moore, dated July 5, 1866.....	374
Deed, George F. Moore and wife to John P. Irvin, dated August 4, 1881.....	375
Deed, E. A. Irvin to John P. Irvin, dated December 26, 1889....	375
Deed, John P. Irvin to Texas Pine Land Association, dated December 11, 1891.....	375
Deposition of John P. Irvin.....	375
Release, E. A. Irvin to Texas Pine Land Association, dated April 28, 1897.....	381
Deed, Texas Pine Land Association to Houston Oil Company of Texas, dated July 31, 1901.....	381
Deed, N. B. Scott to Texas Pine Land Association, dated April 6, 1898.....	381
Declaration of trust by trustees of Texas Pine Land Association, dated October 23, 1889.....	381
Declaration of trust, dated September 19, 1892.....	382
Declaration of trust, dated June 28, 1894.....	382
Declaration of trust, dated June 29, 1898.....	382

	Page
Testimony of A. B. Doucette.....	382
Testimony of L. G. Roberts.....	385
Tax receipts, tax collector of Hardin county, Texas.....	837
Agreement of counsel as to payment of taxes by Houston Oil Company of Texas.....	391
Testimony of J. C. Dean.....	391
H. A. Woods.....	404
W. W. Willson.....	436
J. E. Withers.....	458
W. T. Hooker.....	474
A. L. Harris.....	481
Harden Clevinger.....	504
E. J. Newberry.....	509
Mrs. L. Mattingly.....	519
S. A. McNeeley.....	527
H. M. Richter (recalled).....	534
C. A. Woods.....	537
E. H. Hobson.....	543
Eugene McMahan.....	546
J. P. McMahan, Jr.....	549
W. A. McClellan.....	551
T. M. Kennerly.....	556
H. A. Woods (recalled).....	564
Joe Bumstead.....	565
Lease, Asa Massey to Thos. J. Word, dated November 27, 1854.....	591
Testimony of John S. Doughtie.....	592
A. T. Watts.....	597
E. K. Ward.....	599
Power of attorney, Judge George Moore to P. S. Watts, dated May 2, 1878.....	612
Testimony of N. B. Scott.....	615
Deed, James Morgan to W. D. Lee, dated October 17, 1845.....	626
Deed, Wm. D. Lee to Benjamin E. Green.....	627
Deed, Benjamin E. Green to Richard C. Washington, dated Sep- tember 9, 1848.....	627
Deed, Richard C. Washington and wife to William Walker, dated September 22, 1848.....	628
Deed, James Morgan to Ellen Lee, dated March 12, 1863.....	628
Deed, James Morgan to Ellen Lee, dated October 7, 1865.....	629
Record of deed, James Morgan to W. W. Swain.....	631
Judgments in case of Hyde & Goodrich vs. W. D. Lee, district court of Galveston county.....	632
Testimony of E. T. Anderson.....	632
Testimony of C. M. Calloway.....	636
Letter, John A. Veatch to J. P. Bordon, dated January 18, 1839.....	642
Testimony of H. W. Gardner.....	648
J. T. Shelby.....	656
C. A. Woods (recalled).....	664
Deposition of Mary W. Montgomery.....	667
Will of William M. Goodrich, dated February 4, 1879.....	668

INDEX.

	Page
Deposition of Mrs. Jane E. Jones.....	669
John C. Fall.....	673
Dock Owens	677
Defeasance, T. J. Word and John Smith to William B. Frazer and wife, dated January 19, 1855.....	681
Census return, year 1850, for the family of William Daniels....	683
Census return, year 1860, for the family of Wm. Daniels.....	684
Testimony of W. T. Carroll.....	685
Elias K. Ward (recalled).....	695
Tom Patillo	707
N. B. Scott.....	718
W. H. Knipple.....	723
Wiley Brackin	729
J. P. Bumstead.....	732
L. F. Daniell.....	737
Letter, Houston Oil Company of Texas to H. G. Brown Supply Company, dated June 7, 1911.....	747
Letter, Houston Oil Company of Texas to H. G. Brown Supply Company, dated July 7, 1911.....	748
Amended petition in case of John A. Walker <i>et al.</i> vs. Beaumont Shingle & Lbr. Co., in U. S. court at Beaumont.....	749
Contract between Houston Oil Company of Texas and the Texas Builders Supply Co., dated July 7, 1911.....	751
Testimony of W. A. McClellan (recalled)	757
Special charges requested by defendants.....	760
Charge of the court.....	792
Judgment	806
Defendants' motion for a new trial.....	811
Order overruling said motion.....	857
Order extending time to file bill of exceptions.....	858
Judge's certificate signing bill of exceptions.....	859
Defendants' notice to Texas Builders Supply Company to join in petition for writ of error.....	859
Defendants' petition for authority to prosecute writ of error without joinder of Texas Builders Supply Company.....	860
Order on petition.....	862
Petition of Houston Oil Company <i>et al.</i> for writ of error.....	862
Assignment of errors.....	864
Order allowing writ of error.....	960
Supersedeas bond	960
Order to transmit original papers.....	968
Clerk's certificate	971
Motion for restitution.....	972
Reply of defendants in error to motion for restitution.....	982
Argument and submission.....	988
Opinion, Walker, J.....	988
Judgment	991
Petition for rehearing.....	991
Order denying rehearing.....	999
Order transmitting original exhibits.....	1000
Clerk's certificate	1000
Writ of certiorari and return.....	1001



UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on Friday, November 20th, A. D. 1914, at New Orleans, Louisiana, Before the Honorable Don A. Pardee and the Honorable Richard W. Walker, Circuit Judges, and the Honorable Thomas S. Maxey, District Judge.

HOUSTON OIL COMPANY OF TEXAS et al., Plaintiffs in Error,
versus

CORNELIA G. GOODRICH et al., Defendants in Error.

Be it remembered, that heretofore, to-wit, on the 8th day of March, A. D. 1915, a transcript of the record of the above styled cause, pursuant to a writ of error to the District Court of the United States for the Eastern District of Texas, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2748, as follows:

(a)



CAPTION.

BE IT REMEMBERED, That at a regular term of the District Court of the United States for the Eastern District of Texas, in the Fifth Circuit, begun and holden at Beaumont, Texas, on the 16th day of November, A. D. 1914, and which term adjourned on the 31st day of December, A. D. 1914, the Honorable Gordon Russell, United States District Judge for the Eastern District of Texas, presiding, the following proceedings were had, and the following cause came on for trial, and was tried, to-wit:

Style of Cause:

CORNELIA G. GOODRICH, ET AL.,

versus

HOUSTON OIL COMPANY OF TEXAS, ET AL.,

PLAINTIFFS' ORIGINAL PETITION.

Filed in U. S. District Court on June 7, 1911.

To the Honorable Circuit Court:

Now come Cornelia G. Goodrich, a feme sole, Edward L. Montgomery Jr., and Margaret W. Montgomery, a feme sole, citizens of the City and County of New York, State of New York, Edward L. Montgomery and wife Mary W. Montgomery, citizens of Sullivan County, State of New York, and Helen M. Krasica, joined by her husband Jean Krasica, citizens of the City of Paris, Republic of France, hereinafter styled plaintiffs, and bring this suit against the Houston Oil Company of Texas, a corporation duly incorporated under and by virtue of the laws of the State of Texas with its principal office and place of business in Harris County, Texas, where it is represented by its officers and agents, upon whom service may be had, and the Kirby Lumber Company, a corporation duly incorporated under and by virtue of the laws of the State of Texas, having its principal office and place of business in Harris County, Texas, where it is represented by its officers and agents upon whom service may be had, and against the Maryland Trust Company, a corporation duly incorporated under and by virtue of the laws of the State of Maryland, having its principal office in the City of Baltimore, Maryland, where it is represented by its officers and agents upon whom service may be had, hereinafter called defendants, and thereupon aver:

That the plaintiffs are all citizens of the State of New York and the Republic of France respectively as hereinbefore stated and that the defendants are citizens of the State of Texas and of Maryland respectively, as hereinbefore stated:

and that the property in controversy in this suit exceeds in value the sum of five thousand dollars (\$5,000).

And for cause of complaint the plaintiffs aver that heretofore to-wit: about the 1st day of March, A. D., 1911, the plaintiffs were lawfully seized and possessed as tenants in common in fee simple title and in the possession of the land hereinafter described; and that on or about said last named date, the defendants as trespassers unlawfully entered upon said land and ejected the plaintiffs therefrom, and have continued to unlawfully with-hold from plaintiffs the possession thereof.

That defendants cut and removed therefrom large quantities of pine and hard wood timber growing thereon, to plaintiffs' damage in the sum of Five Thousand Dollars (\$5,000).

That the land above referred to is described as follows, to-wit:

A part of the Chas. A. Felder headright league survey of land in Hardin County, Texas: Beginning at the N. W. corner of the said survey; thence S. 974 varas to a point on the W. line of said survey; thence E. 10,131 varas, more or less, to a corner on the bank of the Neches River; thence up said river with its meanderings to the N. E. corner of said Felder survey; thence W. with the N. line of the said Felder survey to the place of beginning, containing 1721 acres of land, more or less.

Wherefore, plaintiffs bring this suit and pray that defendants be cited to answer this petition, and on a final trial that the plaintiffs recover of the defendants, the premises aforesaid, together with the damages in the sum of Five Thousand Dollars (\$5,000) or such other sum as the facts may show them entitled to; that they be awarded their writ of pos-

session for said land and execution for such sum as they may recover in damages, together with their cost of suit. They further pray for general relief.

Defendants and each of them are hereby notified to file within the limit fixed by law an abstract of their claim of title to said land.

W. D. GORDON,
THOS. J. BATEN,
Attorneys for Plaintiff.

PLAINTIFFS' FIRST AMENDED ORIGINAL PETITION.

Filed in U. S. District Court on Oct. 30, 1912.

To the Honorable District Court:

Now come Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., and Margaret W. Montgomery, a feme sole, citizens of the City and County of New York, State of New York, Edward L. Montgomery and wife Mary W. Montgomery, citizens of Sullivan County, State of New York, and Helen M. Krasica, joined by her husband Jean Krasica, citizens of the City of Paris, Republic of France, hereinafter styled plaintiffs, and in vacation file this their first amended original petition in lieu of their original petition filed herein on June 7th, 1911, and bring this suit against the Houston Oil Company of Texas, a corporation duly incorporated under and by virtue of the laws of the State of Texas with its principal office and place of business in Harris County, Texas, where it is represented by its officers and agents, upon whom service may be had, and the Kirby Lumber Company, a corporation duly incorporated under and by virtue of the laws of the State of Texas, having its principal office and place of business in Harris County, Texas, where it is represented by

its officers and agents upon whom service may be had, and against the Maryland Trust Company, a corporation duly incorporated under and by virtue of the laws of the State of Maryland, having its principal office in the City of Baltimore, Maryland, where it is represented by its officers and agents upon whom service may be had, and against the Texas Builders Supply Company, a corporation duly incorporated under the laws of the State of Texas, with its principal office and place of business in the City of Beaumont, Jefferson County, Texas, where it is represented by T. E. Danziger, its Secretary and Treasurer and by Geo. C. DeYoung, its President, upon either of whom service may be had and against J. H. Cook, who resides in Hardin County, Texas, hereinafter called defendants, and thereupon aver:

That the plaintiffs are all citizens and residents of the State of New York and the Republic of France respectively as hereinbefore stated and that the defendants are citizens and residents of the State of Texas and the State of Maryland respectively, as hereinbefore stated; and that the property in controversy in this suit exceeds in value the sum of Five Thousand (\$5,000) Dollars.

And for cause of complaint the plaintiffs aver that heretofore, to-wit: About the 1st day of March, A. D., 1911, the plaintiffs were lawfully seized and possessed as tenants in common of the fee simple title and in the possession of the land hereinafter described; and that on or about said last named date, the defendants as trespassers unlawfully entered upon said land and ejected the plaintiffs therefrom, and have continued to unlawfully withhold from plaintiffs the possession thereof.

That defendants cut and removed therefrom large quantities of pine and hardwood timber growing thereon, to plaintiffs' damage in the sum of Five Thousand (\$5,000) Dollars.

That situated upon said land there are large quantities of sand valuable for building purposes, and that the defendants since the first day of September, 1910, have gone on said land and have unlawfully removed large quantities of sand from said land, to-wit: About 1800 car loads of said sand valued at the sum of \$5.00 per car load, making a total of \$9,000. That said defendants have converted said sand into money and appropriated the same to their own use and benefit and have wholly failed and refused to account to these plaintiffs for the same or any portion thereof.

That the said land above referred to is described as follows, to-wit:

In Hardin County, Texas, and being a part of a league granted by the Mexican Government to Charles A. Felder and particularly described as follows: Beginning at the N. E. corner of said league on the West bank of the Neches River; thence West with the N. B. line of said league to the N. W. corner of the same: Thence South with the W. B. line of said league to a point on said W. B. line from which a line projected East to the Neches River running parallel with the N. B. line of said league, will include between said N. B. line and the line so projected 2578 acres: Thence North from the point so established on the Neches River with its meanders to the place of beginning, said tract containing 2578 acres of land more or less.

Wherefore, plaintiffs bring this suit and pray that the defendant, Texas Builders Supply Co. and J. H. Cook, be duly cited in terms of the law, all the other defendants now

being before the Court, and on a final trial, that the plaintiffs recover of the defendants the premises aforesaid, together with damages in the sum of Fourteen Thousand (\$14,000) Dollars, or such other sum as the facts may show them entitled to; and that they be awarded their writ of possession for said land and execution for such sum as they may recover in damages, together with their cost of suit. They further pray for general relief.

The defendants and each of them are hereby notified to file, within the limit fixed by law, an abstract of their claim of title to said land.

W. D. GORDON,
THOS. J. BATEN,

Attorneys for Plaintiffs.

INTERVENERS' ORIGINAL PETITION.

Filed in U. S. District Court on Apl. 1, 1912.

To the Judge of said Court:

Now comes Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband Louis L. Cox all citizens and residents of the County of Franklin and State of Kentucky, and by leave of the court file this their plea of intervention in the above numbered and entitled cause, and complaining of the Houston Oil Company of Texas, and the Kirby Lumber Company, both citizens of the State of Texas with their domiciles and principal offices at Houston in Harris County Texas, and of The Maryland Trust Company, Trustee a citizen of the State of Maryland with its domicile in the City of Baltimore in said State, and of Cornelia G. Goodrich, Edward L. Montgomery, Jr., and Margaret W. Montgomery, a feme sole, citizens and residents of the

City, County and State of New York, and of Edward L. Montgomery and his wife Mary W. Montgomery, both residents and citizens of the County of Sullivan and State of New York, and of Helen M. Krasica and her husband Jean Krasica both citizens and residents of the City of Paris, Republic of France, respectfully represents: That the aforesaid interveners, heretofore, to-wit on first day of January 1911, were the owners in fee simple, and entitled to the possession, and ever since have been and are now of that certain tract of land situated in Hardin County, in the State of Texas, (a part of a league granted by the Mexican Government to Charles A. Felder, and particularly described as follows: Beginning at the N. E. corner of said league on the West bank of the Neches River; Thence West with the N. B. line of said league to the N. W. corner of the same; Thence South with the W. B. line of said league to a point on said W. B. line from which a line projected East to the Neches River running parallel with the N. B. line of said league, will include between said N. B. line and the line so projected 2578 acres; Thence North from the point so established on the Neches River with its meanders to the place of beginning.) That the aforesaid plaintiffs and defendants in the above numbered and entitled cause, on first day of January 1911 unlawfully entered upon said premises and ejected these interveners therefrom and now wrongfully withhold from interveners the possession thereof to their great damage in the sum of ten thousand dollars.

That the aforesaid plaintiffs and defendants have wrongfully cut and carried away from said premises so owned by interveners large quantities of timber growing on said land and have converted the same to their own use, of the reason-

able value of ten thousand dollars, for which they are justly indebted to interveners.

Wherefore the premises considered interveners pray that they have judgment against the plaintiffs and defendants herein for the title and possession of the above described premises, with their writ of possession and that they recover such damages as they may be entitled to for waste committed by said parties, for such other and further relief as they may be entitled to, and for all costs in this behalf expended.

E. E. EASTERLING,

H. M. WHITAKER,

Attorneys for Intervenors.

INTERVENERS' FIRST AMENDED ORIGINAL PETITION.

Filed in U. S. District Court on Dec. 2, 1912.

Comes now Fannie M. Allen, a feme sole, Mary M. Steadman a feme sole, Ophelia M. Cox and her husband Louis L. Cox all citizens and residents of Franklin County State of Kentucky, and by leave of the court file this their first amended petition of intervention in lieu of their original petition of intervention filed herein on April 1st, 1912. And interveners complain of the Houston Oil Company of Texas, and The Kirby Lumber Company both corporations created under the laws of Texas, both citizens of the State of Texas with their domiciles and principal offices at Houston in Harris County Texas, and of the Maryland Trust Company, Trustee, a corporation and a citizen of the State of Maryland with its domicile at Baltimore in Said State, and of Cornelia G. Goodrich, Edward L. Montgomery, Jr. and Margaret W. Montgomery, a feme sole, citizens and residents of City, County

and State of New York, and of Edward L. Montgomery and his wife Mary W. Montgomery both residents and citizens of Sullivan County New York, and of Helen M. Krasica and her husband Jean Krasica both citizens and residents of the City of Paris Republic of France, and of the Texas Builders Supply Company, a corporation duly incorporated under the laws of the State of Texas with its domicile at Beaumont in Jefferson County Texas, of which State it is a citizen, and of J. H. Cook a resident and citizen of Hardin County Texas, and respectfully represents: That the aforesaid interveners heretofore to-wit on 1st day of January 1911, were the owners in fee simple, and entitled to the possession, and ever since have been and are now of that certain tract of land situated in Hardin County Texas, a part of a league granted by the Mexican government to Chas. A. Felder and particularly described as follows: Beginning at the N. E. Corner of said league on the West bank of the Neches River; thence West with the N. B. line of said league to the N. W. Corner of the same; thence South with the W. B. line of said league to a point on said W. B. line from which a line projected East to the Neches River running parallel with the N. B. line of said league, will include between said N. B. line and the line so projected 2578 acres; thence North from the point so established on the Neches River with its meanders to the place of beginning.

That the aforesaid plaintiffs and defendants in the above entitled cause, on 1st day of January 1911 unlawfully entered upon said premises and ejected these interveners therefrom and wrongfully withhold from interveners the possession thereof to their great damage in the sum of ten thousand

dollars. That the premises so withheld are of the reasonable value of more than five thousand dollars.

That the aforesaid plaintiffs and defendants have wrongfully cut and carried away from said premises so owned by interveners large quantities of timber growing on said land and large quantities of sand and have converted the same to their own use, of the reasonable value of ten thousand dollars, for which they are justly indebted to interveners.

Wherefore the premises considered interveners pray that they have judgment against the aforesaid plaintiffs and defendants herein for the possession of the above described premises, with their writ of possession, and that they recover such damages as they may be entitled to for waste committed by said parties, and for such other and further relief as they may be entitled to, and for all costs in his behalf expended.

E. E. EASTERLING,

H. M. WHITAKER,

Attorneys for Interveners.

ORIGINAL ANSWER OF DEFENDANTS HOUSTON
OIL COMPANY OF TEXAS, ET AL., TO
PLAINTIFFS' ORIGINAL PETITION.

Filed in U. S. District Court on Mch. 29, 1912.

Come now the defendants, Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, Trustee, and, answering the petition of the plaintiffs, filed herein on the 7th day of June, A. D. 1911, for answer say:

1.

That said petition is insufficient in law, and states no cause of action against these defendants, or either of them, and

they, and each of them demur generally to the allegations in said petition contained, and of this they pray judgment of the court.

2.

And for other and further answer herein, if necessary, these defendants, and each of them, deny all and singular the allegations in plaintiffs' said petition contained, and demand strict proof thereof; and they and each of them say that they are not guilty of the wrongs, injuries, trespasses, and torts, in plaintiffs' said petition charged against them, and of this they put themselves upon the country.

3.

And these defendants, further answering, say that plaintiffs herein, nor either of them, should have and maintain their cause of action against these defendants, or either of them, because the defendant Houston Oil Company of Texas, and those whose title it has, has had and held peaceable, continuous, and adverse possession under title and color of title from and under the sovereignty of the soil to the land and tenements described in plaintiffs' said petition, being a portion of the Charles A. Felder league, lying and being situated in Hardin County, Texas, for more than three (3) years after plaintiffs' cause of action, if any, accrued, and before the commencement of this suit, and of this the defendants, and each of them, put themselves upon the country.

4.

And for other and further answer herein, these defendants, and each of them, say that plaintiffs herein, nor any of them, should have and maintain their cause of action against these defendants or any of them, for that the defendant

Houston Oil Company of Texas and those whose estate it has, claiming the same under a deed or deeds duly registered, has had peaceable, continuous, and adverse possession of the lands and tenements claimed and described in plaintiffs' said petition filed herein, being a portion of the Charles A. Felder league, lying and being situated in Hardin County, Texas, cultivating, using and enjoying the same, and paying all taxes due thereon, for a period of more than five years, after plaintiffs' cause of action, if any, accrued, and before the commencement of this suit, and of this these defendants, and each of them put themselves upon the country.

5.

And for other and further answer herein, if necessary, these defendants, and each of them, say that plaintiffs herein, nor any of them, should have and maintain their cause of action against these defendants, nor any of them, because the defendants Houston Oil Company of Texas, and those whose estate it has, claiming to have good and perfect right and title to the land in controversy herein, lying and being situated in Hardin County, Texas, and being a portion of the Charles A. Felder League in said County, more particularly described in plaintiffs' original petition filed herein, has had and held peaceable possession of the land claimed by plaintiffs herein, and adverse possession of the same, cultivating, using and enjoying the same, for a period of more than ten years after plaintiffs' cause of action, if any, accrued, and before the commencement of this suit, and of this these defendants and each of them put themselves upon the country.

And the defendant Houston Oil Company of Texas, becoming the actor herein, and praying for affirmative relief against the plaintiffs, Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery, Mary W. Montgomery, and Helen M. Krasica and her husband Jean Krasica, respectfully represents unto the court that said plaintiffs reside as alleged in their original petition filed herein, and that this defendant is domiciled as alleged in plaintiffs' said petition; that the value of the land and premises in controversy herein is in excess of Five Thousand (\$5,000.00) Dollars.

And for its cause of action against said plaintiffs, and each of them, this defendant alleges that heretofore towit about the first day of March, A. D. 1941, this defendant was lawfully seized and possessed of the land and premises described in plaintiff's original petition filed herein, holding and claiming the same in fee simple, and that on or about said last named date, in manner and form as alleged in plaintiffs' original petition, said plaintiffs above named, and each of them, as trespassers, unlawfully entered upon said land and ejected said defendant therefrom, and they, and each of them, unlawfully withhold from said defendant the possession of said land and premises, to its damage in the sum of Five Thousand (\$5000.00) Dollars. That the reasonable annual rental value of said land and premises is the sum of Seventeen Hundred Twenty One (\$1721.00) Dollars.

Premises considered, these defendants and each of them pray that plaintiffs herein, and each of them, take nothing by their said suit, and that these defendants go hence without day.

and recover of said plaintiffs and each of them all their costs in this behalf incurred.

Premises further considered, the defendant, Houston Oil Company of Texas, prays that, upon the final hearing hereof, it do have and recover upon its cross action against plaintiffs herein, and each of them, judgment for the title and possession of all the land in controversy herein, together with its rents, damages, and costs of suit.

And these defendants, and each of them further pray for such other and further relief, general or special, at law or in equity, as, under the facts, they may be entitled to receive.

HIGHTOWER, ORGAIN & BUTLER,

Attorneys for defendants, Houston Oil
Company of Texas, Kirby Lumber
Company, and Maryland Trust Com-
pany, Trustee.

For answer and plea to that portion of plaintiffs' petition in which it is alleged that defendants have removed large quantities of timber and sand from the land in controversy, to the damage of plaintiffs in the sum of \$8000.00 and \$9,000.00, these defendants deny that timber or sand was removed from said land by them, and further say that if any timber or sand was removed therefrom, same was done more than two years before the filing of suit therefor, and is barred by the two years statute of limitations of the State of Texas, which is plead in bar thereof.

HIGHTOWER, ORGAIN & BUTLER,

Attorneys for Defendants.

DEFENDANTS' ORIGINAL ANSWER TO INTER-
VENERS' PETITION.

Filed in U. S. District Court on Dec. 2, 1912.

Come now the defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company, and reserving all their rights herein under their motion to strike out the original petition of the interveners, Fannie M. Allen, *et als.*, for answer, if necessary to said petition in intervention, say:

First.

That said petition is insufficient in law and states no cause of action against these defendants, or either of them, and defendants and each of them demur generally thereto, and of this they pray judgment of the court.

Second.

And specially excepting to said petition these defendants and each of them say that it is insufficient in this, that said petition purports to be filed against these defendants herein for the recovery of a tract of land aggregating two thousand, five hundred and seventy-eight (2578) acres out of the Chas. A. Felder league, which tract of land is more specifically described in said petition, while the original petition of the plaintiffs filed herein prays for the recovery only of a tract of one thousand, seven hundred and twenty-one (1721) acres of land out of said Felder league, said tract of two thousand five hundred and seventy-eight (2578) acres being described by metes and bounds in said original petition in intervention and said tract of one thousand seven hundred and twenty-one (1721) acres of land being described by metes and bounds in said original petition of plaintiffs filed herein.

These defendants further except to said petition in intervention because it alleges that these defendants have cut and removed and carried away from the land in controversy large quantities of growing timber of the value of Ten Thousand Dollars (\$10,000.00) to interveners' damage in said sum of Ten Thousand Dollars (\$10,000.00), while the original petition of plaintiffs filed herein contains allegations to the effect that these defendants have cut and carried away from the land described in said plaintiffs' petition, growing timber to the value only of Five Thousand Dollars (\$5,000.00).

And these defendants further say that said petition in intervention puts in litigation more land and a different tract of land than is placed in litigation by plaintiffs' pleadings herein, and in which plaintiffs claimed an interest, and therefore raises new and additional issues in this cause for the reason that the title of the defendant, Houston Oil Company of Texas, to the land described in said interveners' said petition, is different from the title which it holds to the land described in the original petition of plaintiffs filed herein, and the other two defendants, Maryland Trust Company and Kirby Lumber Company, claim rights in the subject matter of this suit only under the title of the defendant, Houston Oil Company of Texas. And defendants except to said petition for the reason that it is not permissible under the statutes, decisions, and rules of practice governing actions of trespass to try title in the courts of the State of Texas, for the pleadings of interveners in such suit to raise new and additional issues and put in litigation more land than is placed in litigation by the original pleadings of the plaintiff in said cause.

Wherefore, these defendants, and each of them, pray that said original petition in intervention be stricken from the files of this court.

Third.

And for further special exception to said petition in intervention and the portion thereof which alleges that these defendants, and each of them, have cut and carried away from the land in controversy large quantities of timber growing thereon, which these defendants, and each of them, are alleged to have appropriated to their own use to the damage of said interveners in the sum of Ten Thousand Dollars (\$10,000.00) for the reason that said allegation is vague, indefinite and uncertain in that it is not sufficiently stated therein how much timber it is claimed was cut and removed from said land by these defendants, nor is the market value thereof alleged, nor are the dates on which said timber is claimed to have been cut and removed by these defendants set out in said petition, so that these defendants are not sufficiently appraised therefrom of what timber and how much timber which it is claimed they cut and appropriated to their own use and in that respect said petition is wholly insufficient, and of this exception defendants pray judgment of the court.

Fourth.

And for other and further answer herein, if necessary these defendants deny all and singular the allegations in said petition contained and demand strict proof thereof and say that they are not guilty of the wrongs, injuries and trespasses therein charged against them, and of this they put themselves upon the country.

Fifth.

And for answer to that portion of said petition in which it is alleged that these defendants, and each of them, have cut and carried away from the land in controversy large quantities of timber to the damage of said interveners in the sum of Ten Thousand Dollars (\$10,000.00) these defendants say that if any timber was cut and carried away from said land by these defendants, or either of them, which is not admitted, but denied, that said cutting and removal and appropriation of the proceeds thereof to the use and benefit of these defendants was done more than two years, and more than ten years prior to the institution of this suit, and these defendants, and each of them, here and now plead the two years statute of limitation of the State of Texas in bar of said alleged cause of action for the cutting and removal of timber.

Sixth.

And these defendants, further answering, say that interveners herein, nor either of them, should have and maintain their cause of action against these defendants, or either of them, because the defendant, Houston Oil Company of Texas, and those whose title it has, has had and held peaceable, continuous, and adverse possession under title and color of title from and under the sovereignty of the soil to the land and tenements described in interveners' petition being a portion of the Charles A. Felder league, lying and being situated in Hardin County, Texas, for more than three (3) years after interveners' cause of action, if any, accrued and before the commencement of this suit, and of this the defendants, and each of them, put themselves upon the country.

Seventh.

And for other and further answer herein, these defendants, and each of them, say that interveners herein, nor any of them, should have and maintain their cause of action against these defendants, or any of them, for that the defendant, Houston Oil Company of Texas, and those whose estate it has, claiming the same under a deed or deeds duly registered, has had peaceable, continuous and adverse possession of the lands and tenements claimed and described in interveners petition filed herein, being a portion of the Charles A. Felder league, lying and being situated in Hardin County, Texas, cultivating, using and enjoying the same, and paying all taxes due thereon, for a period of more than five years, after interveners' cause of action, if any, accrued, and before the commencement of this suit, and of this these defendants, and each of them put themselves upon the country.

Eighth.

And for other and further answer herein, if necessary, these defendants, and each of them, say that interveners herein, nor any of them should have and maintain their cause of action against these defendants, nor any of them, because the defendant, Houston Oil Company of Texas, and those whose estate it has, claiming to have good and perfect right and title to the land in controversy herein, lying and being situated in Hardin County, Texas, and being a portion of the Charles A. Felder league in said county, more particularly described in interveners' petition filed herein, has had and held peaceable possession of the land claimed by interveners herein, and adverse possession of the same, cultivating, using and enjoying the same, for a period of more than ten years after in-

terveners' cause of action, if any, accrued, and before the commencement of this suit, and of this these defendants, and each of them, put themselves upon the country.

Ninth.

And the defendant, Houston Oil Company of Texas, becoming the actor herein, and praying for affirmative relief against the interveners, Fannie M. Allen, *et als.*, respectfully represents unto the court that said interveners reside as alleged in their petition filed herein, and that this defendant is domiciled as alleged in interveners' said petition; that the value of the land and premises in controversy herein is in excess of Five Thousand Dollars (\$5,000.00).

And for its cause of action against said interveners, and each of them this defendant alleges that heretofore to-wit: about the first day of March, A. D. 1911, this defendant was lawfully seized and possessed of the land and premises described in interveners' petition filed herein, holding and claiming the same in fee simple, and that on or about said last date, in manner and form as alleged in interveners' original petition, said interveners above named, and each of them, as trespassers, unlawfully entered upon said land and ejected said defendant therefrom, and they, and each of them unlawfully withhold from said defendant the possession of said land and premises, and to its damage in the sum of Five Thousand Dollars (\$5,000.00). That the reasonable annual rental value of said land and premises is the sum of Seventeen Hundred and Twenty-one Dollars (\$1,721.00).

Tenth.

Premises considered, these defendants, and each of them, pray that interveners herein, and each of them, take nothing

by their said suit, and that these defendants go hence without day, and recover of said interveners and each of them, all their costs in this behalf incurred.

Premises further considered, the defendant, Houston Oil Company of Texas, prays that, upon the final hearing hereof, it do have and recover upon its cross action against interveners herein, and each of them, judgment for the title and possession of all the land in controversy herein, together with its rents, damage and costs of suit.

HIGHTOWER, ORGAIN & BUTLER,
Attorneys for Defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company.

ANSWER AND CROSS-ACTION OF DEFENDANT TEXAS BUILDERS SUPPLY COMPANY.

* Filed in U. S. District Court on Dec. 2, 1912.

In the above cause comes the Texas Builders Supply Company, a corporation and excepts the plaintiffs' petition herein and says the same is insufficient to require an answer and of this it prays judgment of the court.

2.

Without waiving the foregoing exception, if this defendant is required to answer, then this defendant denies all and singular said allegations, pleads not guilty thereto and of this it prays judgment of the court.

3.

Further answering herein this defendant says that it has never and does not now claim any right, title or interest in the land in controversy and of this it prays judgment of the court.

4.

For further answer herein this defendant says that heretofore, to-wit: On or about Sept. 1910, it did go upon said land and remove sand therefrom but that the same was done under and by virtue of a contract with the defendant, Houston Oil Company of Texas, wherein it purchased sand from said defendant Company; that from September 1910 to September 1st. 1912 it took from said land a total number of cars, being 905 cars of sand, for which it paid the defendant, Houston Oil Company of Texas the total sum of \$1286.00, which is the fair market value of said sand and was paid to said defendant Company under and by virtue of said agreement with said Company.

5.

Defendant says that it has no further interest in this controversy than to protect it from liability against damages on the part of the plaintiffs and it now represents to the Court that it bought, removed and paid for said sand in good faith and by virtue of its contract with said defendant, Houston Oil Company of Texas, believing that it had the right to sell said sand under and by virtue of its claim, and this defendant now prays the court, that in the event the plaintiffs should recover the title to said land and recover damages against said defendant for the sand taken therefrom that this defendant have judgment over against said defendant, Houston Oil Company of Texas, for such amount and for such sums as said plaintiffs may recover from this defendant, and that it have judgment also for its costs of court.

JNO. L. LITTLE,
Attorney for Defendant, Texas Builders
Supply Company.

PLAINTIFFS' FIRST SUPPLEMENTAL PETITION.

Filed in U. S. District Court on Dec. 2, 1912.

Now come the plaintiffs herein and in reply to the pleas of limitation filed by the defendants herein, file this their supplemental petition. And thereupon they show the court as follows:

That the plaintiff, Mary W. Montgomery was married to the plaintiff, E. L. Montgomery, in the year 1879, and has been a married woman ever since that time and therefore she was under coverture during all such time and she here and now pleads the same in bar of the pleas of limitation filed herein by the defendants.

Wherefore she prays that said pleas of limitation be held for naught.

W. D. GORDON,
THOS. J. BATEN,

Attorneys for Plaintiffs.

INTERVENERS' SUPPLEMENTAL PETITION.

Filed in U. S. District Court on Dec. 2, 1912.

Now come the interveners herein and file this, their supplemental plea of intervention in reply to the pleas of limitation filed herein by the defendants. And thereupon they show to the court as follows:

First: That the intervener Fannie M. Allen was married to H. L. Allen on June 13th, 1866, and lived with her husband the said H. L. Allen as man and wife from said time until his death which occurred in the year 1883.

Second: That the intervener May Steadman, was born on May 2nd, A. D., 1857, and was married in the year 1889 to Silas Steadman who died in 1905. That this intervener

May Steadman was therefore a minor up until the year A. D. 1888 and was a married woman from the year 1889 until the death of her husband in 1905.

That the intervener Mrs. L. Cox was born on the 31st day of August, A. D., 1859, and was married to the intervener L. Cox on the 3rd day of September, 1884 and has lived with said L. Cox as man and wife continuously from said time until the present.

Wherefore, these interveners show that the intervener Fannie M. Allen was under the disability of coverture from the year 1866 until the time of the death of her husband in 1883. And the intervener May Steadman was under the disability of minority up until the year 1888, and from the month of January, 1889, she was under the disability of coverture until the death of her husband. And the intervener Mrs. L. Cox was under the disability of minority until August 31st, 1880, and under the disability of coverture from September 31st, 1884 to date.

These interveners therefore here and now plead the above disabilities in bar of defendants' pleas of limitation filed herein by the defendants.

That Ellen Lee Mason was married to Chas. M. Mason Feb. 8th, 1866. Chas. Mason died in December, 1894.

That C. W. P. Morgan was born in the year 1855, was a minor up to the year 1876.

That Nelly Craig was born 1864, and was married in 1884 to H. H. Craig, and was a minor up to 1884. That she is now married to H. H. Craig and has been under coverture since 1884.

That Maria Church was born in 1861 and was married to Henry S. Church in 1879, and was a minor up until her

marriage. That she died in 1884, leaving her husband surviving, and these interveners therefore herein and now plead the above disabilities of their co-tenants above named in bar of defendants' pleas of limitation filed herein by the defendants.

H. M. WHITAKER,
E. E. EASTERLING,
Attys. for Intervenors.

PLAINTIFFS' AND INTERVENERS' SUPPLEMENTAL PETITION.

Filed in U. S. District Court on Nov. 18, 1914.

Come now the plaintiffs and interveners in the above numbered and entitled cause, and file this their supplemental petition in reply to defendants' pleas of limitation and respectfully show to the court that the defendants can not avail themselves of said pleas for the reason that a deed or deeds under which they assert and claim title to the land in controversy are forged, and were not executed by the grantors or purported grantors therein, nor by their authority, all as shown by proper affidavits filed herein charging said deeds to be forged.

W. D. GORDON,
THOS. J. BATEN,
Attorneys for Plaintiffs
E. E. EASTERLING,
H. M. WHITAKER,
Attorneys for Intervenors.

JUDGMENT ENTERED IN U. S. DISTRICT COURT
ON DEC. 7, 1912.

On this 2nd day of December, 1912, at a regular term of this court, the above numbered and entitled cause was

called for trial. Thereupon the plaintiffs and interveners say they will no longer prosecute their suit against the defendant J. H. Cook and said defendant Cook declines further to prosecute his cross action for the recovery sought by him in his answer herein.

It is therefore ordered and adjudged by the court that the cause of action of both the plaintiffs and interveners against the defendant Cook, as well as the cross action of said defendant, be dismissed without prejudice to either party and that the said defendant Cook recover of plaintiffs and interveners his costs in this behalf expended.

And thereupon all parties to said suit, plaintiffs interveners and defendants announced ready for trial and then came a jury of good and lawful men, to-wit: W. L. Joiner, foreman, and eleven others who were duly selected, empanelled and sworn as the law directs and the said trial was continued from day to day up to and including the 7th day of December, 1912, when after hearing the evidence, argument of counsel and charge of the court, the jury returned into open court the following verdict:

D. L. No. 408.

Cornelia G. Goodrich et al

v.

Houston Oil Co. of Texas et al.

We, the jury, under directions from the Court find a verdict for the plaintiffs and interveners jointly against the defendants for the land sued for, and further find for the plaintiffs and interveners jointly against the defendants, Texas Builders Supply Company and the Houston Oil Company of Texas, for the sum of Twelve Hundred and Eighty-six Dol-

lars for the sand removed from said land and we further find a verdict in favor of the Texas Builders Supply Company, against the Houston Oil Company of Texas for whatever portion of said sum of money may be collected on this verdict from the Texas Builders Supply Company.

Beaumont, Texas, Dec. 7th 1912.

W. L. JOINER
Foreman.

And it having been made to appear to the Court that the plaintiffs and interveners had compromised their differences, and had agreed that any recovery had by the one or the other or by both, should inure in equal portions to the heirs of Wm. M. Goodrich, deceased, plaintiffs, on the one part, and the heirs or devisees of Jas. Morgan deceased, on the other part.

It is therefore ordered, adjudged and decreed by the Court that the plaintiffs, Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery and his wife Mary W. Montgomery, Helen M. Krasica and her husband Jean Krasica, the heirs of Wm. M. Goodrich, deceased, and interveners Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband Louis L. Cox, for those claiming under Jas. Morgan deceased, do have and recover of and from the Houston Oil Company of Texas, a corporation, the Kirby Lumber Company, a corporation, the Maryland Trust Company, a corporation, and the Texas Builders Supply Company, a corporation, the following described tract of land, to-wit: A part of the league granted by the Mexican Government to Chas. A. Felder, situated in Hardin County, Texas, and particularly described as follows:

Beginning at the Northeast corner of said league on the West bank of the Neches River; thence West with the North boundary line of said league to the Northwest corner of the same: Thence South with the West boundary line of said league to a point on said West boundary line from which a line projected East to the Neches River running parallel with the North boundary line of said league, will include between said North boundary line and the line so projected, 2578 acres: Thence North from the point so established on the Neches River with its meanders to the place of beginning, being all of said Chas. A. Felder league of land, save and except the remainder thereof, to-wit: the 1850 acres South of and adjoining said above described tract.

And in accordance with the agreement between plaintiffs and interveners, the title to an undivided one-half of said land is vested in the plaintiffs, the heirs of Wm. M. Goodrich, deceased, and the title to the other undivided half of said land is vested in the heirs or devisees of Jas. Morgan deceased.

It is further ordered and adjudged that the plaintiffs and interveners have their writ of possession as many and as often as may be necessary to put them in possession of the above described premises.

It is further ordered, adjudged and decreed that the plaintiffs and interveners, as above named, do have and recover of and from the Houston Oil Company of Texas and the Texas Builders Supply Company, defendants herein, the sum of \$1286.00 as damages, with interest thereon at the rate of six per cent per annum from the date of this judgment, for which let execution issue; the said sum of \$1286.00 in accordance with agreement of plaintiffs and interveners, to be

divided between them as above provided with reference to the said land. That is, plaintiffs one-half and interveners one-half.

It is further ordered and adjudged that the defendant Texas Builders Supply Company do have and recover of and from the defendant Houston Oil Company of Texas whatever sum of money that it may be required to pay plaintiffs and interveners under this judgment, and that the defendant Texas Builders Supply Company recover of and from the Houston Oil Company of Texas, its costs in this behalf expended.

It is further ordered and adjudged that the plaintiffs and interveners do have and recover of and from the defendants Houston Oil Company of Texas, Kirby Lumber Company, Maryland Trust Company and the Texas Builders Supply Company, their costs in this behalf expended and that execution issue therefor.

GORDON RUSSELL, Judge.

PRAECIPE BY PLAINTIFFS AND INTERVENERS
FOR WRIT OF POSSESSION AND EXECUTION
UNDER JUDGMENT.

Filed in U. S. District Court on Feb. 20, 1913.

Beaumont Texas Feby 20/13

To the Clerk of the U. S. District Court
Beaumont Texas

Dear Sir:

The plaintiffs and interveners in the case of Cornelia G. Goodrich et al by Houston Oil Co of Texas et al No 408 request you to issue execution for the moneyed judgment and

costs against the defendants, and also writ of possession for the land recovered by the judgment

Yours truly

W. D. GORDON and

T. J. BATEN,

Attorneys for Plaintiffs.

H. M. WHITAKER,

E. E. EASTERLING,

Attorneys for Interveners.

WRIT OF EXECUTION AND MARSHAL'S RETURN THEREON.

Filed in U. S. District Court on Mch. 19, 1913.

The United States District Court.

Eastern District of Texas.

The President of the United States of America,

To the Marshal of the Eastern District of Texas—Greeting:

WHEREAS, Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and Louis L. Cox on the 7th day of December, A. D. one thousand nine hundred and twelve, at our District Court of the United States, in and for the Eastern District of Texas, holding Sessions at Beaumont recovered a Judgment against The Houston Oil Company of Texas and the Texas Builders Supply Company, corporations, for the sum of One Thousand Two Hundred and Eighty-six (\$1,286.00) Dollars, with interest thereon at the rate of six per centum per annum, from the 7th day of December A. D. 1912, until paid; and against The Houston Oil Company of Texas, the Kirby Lumber

Company, Maryland Trust Company and the Texas Builders Supply Company, all corporations, for all the costs of suit, amounting to \$184.83; and all of which to the said Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and Louis L. Cox are now adjudged.

These are, therefore, to command you, Phil E. Baer, U. S. Marshal for the Eastern Dist. of Tex. that of the goods and chattels, lands and tenements of the said The Houston Oil Company of Texas and the Texas Builders Supply Company, you cause to be made the full amount of said judgment for \$1286.00 and interest; and that of the goods, and chattels, lands and tenements of the said The Houston Oil Company of Texas, the Kirby Lumber Company, the Maryland Trust Company, and Texas Builders Supply Company, you cause to be made the full amount of said costs, together with all further legal fees and charges that may accrue by virtue of this writ, the costs shown by accompanying statement, amounting to \$184.83.

Herein fail not, and due return make of this Writ, certifying how you have executed the same within ninety days from this date.

Witness, the Honorable Gordon Russell, Judge of the District Court of the United States for the Eastern District of Texas, and the seal of said court at Beaumont this the 25th day of February in the year of our Lord one thousand nine hundred and thirteen, and of American Independence the 137th year.

J. R. BLADES,

Clerk U. S. Dis. Court Eastern District of Texas.

By C. C. BUMPAS, Deputy.

[Itemized cost bill attached to execution, but omitted here.

J. R. BLADES, Clerk.]

MARSHAL'S RETURN.

Came to hand the 10th. day of March, A. D. 1913, at 3 o'clock, P. M., and executed on the 11th. day of March, A. D. 1913, at 10 o'clock, A. M., by receiving from Messrs. Hightower, Orgain and Butler, of Beaumont, Texas, attorneys of record for the defendant, Houston Oil Company of Texas, the sum of Fifteen Hundred Six and 37/100 Dollars (\$1506.37) in full settlement and satisfaction of the amount of the within execution, interest thereon, costs of court, and the clerk's and marshal's fees and commissions connected with the issuance, execution and return of this writ, said payment being made by said Hightower, Orgain and Butler, attorneys for defendant, Houston Oil Company, as stated by them, not in recognition of the judgment upon which this execution issued, but under protest, and only because of the issuance and threatened levy of this execution by me.

Witness my hand this the 11th. day of March, 1913, at Beaumont, Texas.

S. B. TURBERVILLE,

United States Marshal, Eastern District of Texas,

By C. W. BAUGHN,

Deputy Marshal.

Principal,	\$1286.00.
Interest,	
3 mos. 4 days,	20.14.
Costs,	184.83.
Commission,	14.90.
Return of Writ,	.50.
Total,	<hr/> \$1506.37.

WRIT OF POSSESSION AND MARSHAL'S RETURN
THEREON.

Filed in U. S. District Court on Mch. 8, 1913.

In the United States District Court at Beaumont.

United States of America,
Eastern District of Texas.

Cornelia G. Goodrich, et al.,

vs. D. L. No. 408.

The Houston Oil Company of Texas, et al.

The President of the United States,

To the Marshal for the Eastern District of Texas,--
Greeting:

Whereas, On the 7th day of December, 1912, plaintiffs and the interveners recovered a judgment against The Houston Oil Company of Texas, the Kirby Lumber Company, the Maryland Trust Company, and the Texas Builders Supply Company, in the District Court of the United States for the Eastern District of Texas, holding sessions at Beaumont, for the possession of a certain tract or parcel of land described as follows, to-wit:

A part of the league granted by the Mexican Government to Chas. A. Felder, situated in Hardin County, Texas, and particularly described as follows:

Beginning at the Northeast corner of said league on the West bank of the Neches River; thence West with the North boundary line of said league to the Northwest corner of the same; thence South with the West boundary line of said league to a point on said West boundary line from which a line projected East to the Neches River running parallel with the North boundary line of said league, will include between said North boundary line and the line so projected, 2578 acres; thence North from the point so established on the Neches

River with its meanders to the place of beginning, being all of said Chas. A. Felder league of land, save and except the remainder thereof, to-wit: the 1850 acres South of and adjoining said above described tract.

Therefore, you are hereby commanded to deliver to the said plaintiffs and interveners, to-wit: Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and Louis L. Cox the possession of said land and premises hereinbefore described as against the said The Houston Oil Company of Texas, the Kirby Lumber Company, the Maryland Trust Company, and the Texas Builders Supply Company, and all persons claiming under or through them since the institution of this suit.

Herein fail not, and of this writ make due return.

Witness the Honorable Gordon Russell, Judge of the U. S. District Court for the Eastern District of Texas, and the seal of said court at Beaumont, this the 25th day of February, A. D. 1913, and of American Independence the 137th year.

J. R. BLADES, Clerk.

By C. C. BUMPAS, Deputy.

RETURN.

Received this Writ on Feb. 27th, 1913 and executed on same date by dispossessing the Texas Builders Supply Company through service on Theodore E. Danziger, Secretary and Treasurer, of this tract of land in this writ described, they being the only defendants found in active possession of the land and I by virtue of this writ put in possession of said

described tract of land the plaintiffs and interveners mentioned in this writ through their attorneys.

Returned on this the 3rd day of March, 1913.

PHIL E. BAER, U. S. Marshal,

By C. L. RUTT, Deputy U. S. Marshal.

STATEMENT BY CLERK OF U. S. DISTRICT COURT.

This is to certify that the mandate of the U. S. Circuit Court of Appeals for the Fifth Judicial Circuit, in the case of Houston Oil Company of Texas et al., Plaintiffs in Error, vs. Cornelia G. Goodrich et al., Defendants in Error, reversing the judgment herein entered December 7, 1912, was issued by the Clerk of said U. S. Circuit Court of Appeals on February 10th, 1914, and was duly filed in the U. S. District Court by me on June 16, 1914.

J. R. BLADES, Clerk,

By C. C. BUMPAS, Deputy.

DEFENDANTS' MOTION FOR RESTITUTION.

Filed in U. S. District Court on Nov. 14, 1914.

Come now the defendants, the Houston Oil Company of Texas, the Maryland Trust Company, Trustee, and the Kirby Lumber Company, and show to the court as follows:

I.

That heretofore, to-wit, on or about the 7th day of December, 1912, judgment was rendered in this cause in favor of Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery, and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia

M. Cox and husband, Louis L. Cox, against the Houston Oil Company of Texas, the Kirby Lumber Company, and the Maryland Trust Company, and the Texas Builders' Supply Company, for the title and possession of a part of the league of land granted by the Mexican Government to Charles A. Felder, in Hardin County, Texas, said part being the north two thousand five hundred and seventy-eight (2,578) acres thereof, as will be fully shown by reference to the judgment in this cause on the Minutes of this court, to which judgment and the description of said land as contained therein reference is hereby made. That prior to the date of said judgment these defendants were in full and exclusive possession of said property.

II.

That, by the terms of said judgment, said parties recovered of and from the Houston Oil Company of Texas and the Texas Builders' Supply Company the sum of one thousand two hundred and eighty-six dollars (\$1,286.00), as damages, with interest thereon at the rate of six per cent (6%) per annum from the date of said judgment, together with all costs of court in this cause, as will be fully shown by said judgment, as aforesaid.

III.

That thereafter, to-wit, on or about the 25th day of February, 1913, there was issued by the Clerk of this court upon said judgment a certain writ of possession directed to the United States Marshal for the Eastern District of Texas, commanding said officer to place the said parties above named so recovering said judgment against the Houston Oil Company of Texas, the Maryland Trust Company, and the

Kirby Lumber Company in possession of the said tract of land. Reference is hereby made to said writ of possession shown among the records of this cause in this court for full particulars.

IV.

That thereupon said writ of possession was placed in the hands of said United States Marshal and was executed by him on heretofore, to-wit, on or about the 27th day of February, 1913, by taking possession of said land so described in said judgment, and delivering same to the said Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and placing said persons in full and exclusive possession thereof.

V.

That in addition to said writ of possession the said clerk issued on heretofore, to-wit, on or about the 25th day of February, 1913, a writ of execution, directed to the United States Marshal for the Eastern District of Texas, commanding such officer, that of the goods and chattels, lands and tenements of the Houston Oil Company of Texas, and of the Texas Builders' Supply Company, such officer cause to be made the full amount of such judgment, to-wit, the sum of one thousand two hundred and eighty-six dollars (\$1,286.00), with interest thereon, and all costs of court at that time accrued, amounting to the sum of one hundred and eighty-four and 83-100 dollars (\$184.83), together with all further costs of executing said writ.

VI.

That said writ of execution was thereupon placed in the hands of the United States Marshal for the Eastern District of Texas, who thereupon demanded payment thereof of the Houston Oil Company of Texas. And although the Houston Oil Company of Texas protested against the issuance and execution of said process, said Houston Oil Company of Texas, in order to prevent the levy of said process was forced to and required and did pay unto the said Marshal the sum of one thousand five hundred and six and 37-100 dollars (\$1,506.37), being the amount of such judgment, interest and all costs of court up to that date. But that said sum of money was so paid to the said United States Marshal under protest, and only because of the issuance and threatened levy of said execution.

VII.

That both said writ of possession and said writ of execution were issued at the request and direction and at the instigation of the said parties who so recovered said judgment, as aforesaid, and the execution of said writ of possession and of the said execution and the collection of said sum of money was at the direction of the said parties.

VIII.

That said judgment provided and directed issuance of said writ of possession and of said execution.

IX.

That at the time of the issuance of said writ of possession and the execution thereof, said defendants, the Houston Oil Company of Texas, the Maryland Trust Company, and the Kirby Lumber Company had obtained from this

Honorable Court an order allowing ninety (90) days, from and after December 10, 1912, within which to prepare, have settled and filed, their bill of exceptions herein, for the purpose of prosecuting a writ of error in this cause to the Honorable United States Circuit Court of Appeals for the Fifth Circuit. That thereafter, to-wit, on February 3, 1913, Your Honor granted an enlargement and extension of said time, of forty-five (45) days, in addition to the time already allowed, within which to prepare, have settled and filed, such bill of exceptions. All of which is of record manifest, and to which reference is made.

X.

That thereafter on, to-wit, April 22, 1913, Your Honor entered an order, approving said bill of exceptions, and on, to-wit, May 16, 1913, upon a petition duly presented, allowed an application for a writ of error on behalf of the Houston Oil Company of Texas, the Kirby Lumber Company, and the Maryland Trust Company, to the Honorable Circuit Court of Appeals for the Fifth Circuit, which writ of error was duly prosecuted by the said parties in said court and came on to hearing before said Honorable United States Circuit Court of Appeals in due time; and thereafter, to-wit, on the 10th day of February, 1914, said Honorable Circuit Court of Appeals for the Fifth Circuit entered its order, in all things reversing the judgment of this court aforesaid and remanding this cause to this court for further proceedings, in accordance with the opinion of the said Honorable United States Circuit Court of Appeals. All of which will be shown by the mandate from the said Honorable Circuit Court of Appeals on file in this cause, to which reference is hereby made.

XI.

That your petitioners are informed and believe, and upon such information and belief allege the facts to be, that the said Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, so placed in possession of the said land, are holding same by and through their respective attorneys, to-wit: W. D. Gordon, Thomas J. Baten, E. E. Easterling, and H. M. Whittaker, and have been so holding same since placed in possession by said Marshal; and that said persons and said attorneys likewise have in their possession and are holding said sum of money, to-wit, one thousand five hundred and six and 37-100 dollars (\$1,506.37), so collected from the Houston Oil Company of Texas as aforesaid; all of which is being held in the Eastern District of Texas. And your petitioners are further informed and believe, and upon such information and belief allege the facts to be, that said parties, acting for themselves and by and through their said attorneys, have cut and removed from said tract of land, since the rendition of said judgment in this cause, timber of the value of, to-wit, seventy-five thousand (\$75,000.00) dollars; and that the said parties and their said attorneys have in their possession and under their control within the Eastern District of Texas, the sum of, to-wit, fifty-five thousand (\$55,000.00) dollars, which is a part of the proceeds of the sale of said timber.

XII.

That by reason of said facts, hereinbefore set forth, the Houston Oil Company of Texas and the Maryland Trust

Company and the Kirby Lumber Company are entitled to have restitution of the said premises, and of the said sum of money so paid by the Houston Oil Company of Texas, and of the proceeds of the sale of the timber cut therefrom. But it is expressly stipulated that by making this motion the parties making same do not in any way whatsoever commit themselves that the money so alleged to be on hand as a part of the proceeds of the said timber is the full value thereof, so as to preclude these parties from recovering from said persons, or from any other persons engaged in the cutting of said timber, the manufactured value or reasonable market value thereof, or any part thereof.

Premises considered, the Houston Oil Company of Texas, the Maryland Trust Company, and the Kirby Lumber Company pray that an order be entered, setting down this motion for hearing, of which parties adversely interested be notified; and that upon hearing hereof an order be entered:

(1) Directing the United States Marshal for the Eastern District of Texas to take possession of said tract of land, all and every part thereof, together with all improvements thereon, and place same again in the possession of the Houston Oil Company of Texas.

(2) That an order be entered, requiring the said Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the said W. D. Gordon, Thomas J. Baten, E. E. Easterling, and H. M. Whitaker, all and each of them, to pay over to the Houston Oil Company of Texas the said sum of one thousand five hun-

dred and six and 37-100 dollars (\$1,506.37), so collected by the United States Marshal from the said Houston Oil Company of Texas; and that your petitioners have all proper and appropriate process to enforce said order against said persons.

(3) And that an order enter, directing the said Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the said W. D. Gordon, Thomas J. Baten, E. E. Easterling, and H. M. Whittaker, all and each of them, to pay over to the Houston Oil Company of Texas, the said sum of money so held by them, or each or any of them, as the proceeds of the sale of the timber cut and removed from said tract of land since the date of said judgment; and that your petitioners have all necessary and appropriate process to enforce said order.

(4) That the trial of this case upon the merits thereof be in all things and respects stayed until full and complete restitution of said premises and of said money so paid and the said proceeds of the sale of said timber is made.

Or, should your petitioners not be entitled to the relief above prayed for, that your petitioners have judgment against the said Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the said W. D. Gordon, Thomas J. Baten, E. E. Easterling, and H. M. Whittaker, all and each of them. And further, that

all costs of this proceeding be taxed against said persons, all and each of them.

HOUSTON OIL COMPANY OF TEXAS,
MARYLAND TRUST COMPANY,
KIRBY LUMBER COMPANY,

By H. O. HEAD,
OSWALD S. PARKER,
T. M. KENNERLY,
PARKER & KENNERLY,
Their Attorneys.

State of Texas,
Harris County

Before me, the undersigned authority, on this day personally appeared A. W. Standing, General Manager and Agent of the Houston Oil Company of Texas, and Agent of the Maryland Trust Company and the Kirby Lumber Company, who, being by me first duly sworn, says that the matters and things set forth in the foregoing motion are true and correct.

A. W. STANDING.

Sworn to and subscribed before me, this the 11th day
..... A. D. 1914.

MISS BESSIE SULLIVAN,
Notary Public, Harris Co. Texas.

(Seal)

Upon the presentation to me of the foregoing motion, it is ordered that a hearing be had thereon at the United States Court Room, in the City of Beaumont, on the 17th day of November, 1914; and that the Clerk of this court issue notices to the said Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, and Fannie M. Allen, Mary M.

Steadman, Ophelia M. Cox and husband, Louis L. Cox, or to their attorneys of record, and to the said W. D. Gordon, Thomas J. Baten, E. E. Easterling, and H. M. Whittaker, to appear before this court at said time and place and show cause why said motion should not be granted.

Done at Sherman, Tex., this 12th day of November, A. D. 1914.

GORDON RUSSELL,

U. S. District Judge, Eastern District of Texas.

DEFENDANTS' AMENDMENT TO MOTION FOR RESTITUTION.

Filed in U. S. District Court on Nov. 17, 1914.

Now come the defendants, Houston Oil Company of Texas, Maryland Trust Company, Trustee, and Kirby Lumber, by their attorneys, and leave of the court being first had, file this, their trial amendment to the motion to restitute heretofore filed in this cause on the day of November, A. D. 1914, said motion being set down for hearing on the 17th day of November, A. D. 1914, said trial amendment being as follows, to-wit:

Said defendants here now eliminate from their said motion that part of the last paragraph of same, which is as follows:

"Or, should your petitioners not be entitled to the relief above prayed for, that your petitioners have judgment against the said Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen Krasica and husband, Jean Krasica, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the said W. D. Gordon, Thomas J. Baten, E. E. Easterling, and H. M. Whitaker, all and

each of them. And further, that all costs of this proceeding be taxed against said persons, all and each of them."

H. O. HEAD,
OSWALD S. PARKER,
T. M. KENNERLY,
PARKER & KENNERLY,

Attorneys for Houston Oil Company of Texas, Maryland Trust Company, Trustee, and Kirby Lumber Company.

DEFENDANTS' SECOND AMENDMENT TO MOTION FOR RESTITUTION.

Filed in U. S. District Court on Nov. 17, 1914.

Now come the defendants, Houston Oil Company of Texas, Maryland Trust Company, Trustee, and Kirby Lumber Company, and by permission of the court, file this, their second trial amendment to their motion for restitution filed herein on the day of November, A. D. 1914, and in addition to what is heretofore alleged in said motion and their first trial amendment thereto, show unto the court as follows:

1.

That all of the persons named in the first paragraph of their original motion filed herein, as aforesaid, reside in and are each inhabitants and citizens and residents of countries without and outside of the United States of America, or reside in and are each inhabitants and citizens and residents of some state of the United States of America other than the State of Texas or the State of Maryland, and petitioners refer to the pleadings of said parties filed herein, and make same a part hereof for the purpose of showing the proper residence of said parties.

2.

That none of said persons, as petitioners are informed and believe, and upon such information and belief charge the facts to be, have property within the State of Texas subject to execution or which could be reached by the process of this court, and that, if such persons are permitted to remove from the State of Texas the monies received by such persons for the timber cut and collected under execution, as shown in petitioners' original motion, that if these petitioners finally prevail in this suit, and recover judgment for the land involved in this suit, said petitioners will be unable to collect for the timber so cut, or to realize anything thereon, and same will be a clear loss to your petitioners.

3.

That the Houston Oil Company is a corporation, having its domicile in the State of Texas, and is a resident and inhabitant of the State of Texas. That the Maryland Trust Company is a corporation, having its domicile in the State of Maryland, and is a resident and inhabitant of the State of Maryland. That the Kirby Lumber Company is a corporation, having its domicile in the State of Texas, and is a resident and inhabitant of the State of Texas, and petitioners refer to the pleadings of said parties to show the place of residence and domicile of each of said parties, and adopt such pleadings as a part hereof for that purpose.

4.

That W. D. Gordon, Esq., T. J. Baten, Esq., H. M. Whittaker, Esq., and E. E. Easterling, Esq. are each and all officers of this court, and attorneys practicing before the bar of this court, and are representing either the plaintiffs or the

interveners, as set out in original motion, and each of said attorneys reside in the City of Beaumont, Jefferson County, in the Eastern District of Texas.

5.

That if this case is permitted to go to trial without this court having required restitution, as prayed for in original motion, and plaintiffs and interveners do not recover herein, said plaintiffs and interveners will then be in position to file a supersedeas bond and retain possession of the property involved in the suit, pending an appeal, and will be in position to, and will continue to cut and remove timber from said tract of land, and may remove same from the jurisdiction of the court. That if upon the trial of this cause plaintiffs and interveners recover judgment, your petitioners cannot, by the filing of a supersedeas bond again repossess said property, as they were previous to the entry of judgment herein, as alleged in the original motion.

Wherefore, these petitioners pray, as prayed for in their original motion, and in addition to said prayer, pray that if this court shall find that petitioners are not entitled to have paid over to them the sums of money received by such persons from the cutting and sale of said timber, and the sum of money collected by such person by said execution, that Your Honor require said sums of money, both for the timber cut and removed, and for the judgment collected, to be paid into the registry of this court, and held by the court to await the termination of this litigation.

H. O. HEAD,
PARKER & KENNERLY,
T. M. KENNERLY,
J. J. LEE,

Attorneys for Houston Oil Company of Texas, Maryland Trust Company, Trustee, and Kirby Lumber Company.

PLAINTIFFS' AND INTERVENERS' EXCEPTIONS
TO MOTION FOR RESTITUTION.

Filed in U. S. District Court on Nov. 17, 1914.

Come now the plaintiffs and interveners in the above numbered and entitled cause, and appearing only for the purpose of interposing their pleas and demurrers as are herein-after set out, and say

I.

This court has no jurisdiction to entertain the suit or motion to compel restitution as prayed for by the defendants, because it does not appear that the adversary parties thereto are citizens of different states. Wherefore the said suit or motion should be dismissed.

II.

There has been no such service of proper process or notice as would authorize the court to hear and determine the matters alleged in said motion, or suit. Wherefore the said motion should be dismissed.

III.

And subject to the above and foregoing pleas the plaintiffs and interveners demur to the motion or petition seeking restitution by the defendants, and say that the same is insufficient in law to entitle the defendants to the relief therein prayed for, and for this plaintiffs and interveners pray the judgment of the court.

W. D. GORDON,
THOS. J. BATEN,

Attorneys for plaintiffs.

E. E. EASTERLING,
H. M. WHITAKER,

Att'ys for Intervenors.

AFFIDAVIT OF FORGERY MADE BY CHARLES T.
BUTLER.

Filed in U. S. District Court on Nov. 22, 1912.

Before me, the undersigned authority, on this day personally appeared Charles T. Butler, known to me to be a credible person, and being by me first duly sworn, upon his oath deposes and says:

That he is informed and believes that upon the trial of the above styled and numbered cause, the plaintiffs, Cornelia G. Goodrich et als, and the interveners, Fannie M. Allen et als, to sustain the issue on their part will rely upon a certain purported deed from Charles A. Felder to John A. Veatch, purporting to bear date of June 18, 1839, and purporting to have been acknowledged before John Bevil, Chief Justice of Jasper County and ex officio Notary Public therein, on the 18th day of June, A. D. 1839. That affiant verily believes that said purported deed and the acknowledgment thereof are forgeries, and that no such deed was in fact executed by Charles A. Felder to John A. Veatch on the day and year aforesaid, or any other time, and that no such deed was acknowledged by the said Charles A. Felder before John Bevil, Chief Justice and ex officio Notary Public, Jasper County, on the 18th day of June, A. D. 1839, or at any other time.

That affiant is one of the attorneys of record for the defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company, in the above styled and numbered cause, and as such is authorized to make this affidavit.

CHARLES T. BUTLER,
Affiant.

Sworn to and subscribed before me, this the 20th day of November, A. D. 1912.

In testimony whereof witness my hand and seal of office, at Beaumont, Texas, this the 20th day of November, A. D. 1912.

J. R. BLADES,

Clerk, U. S. District Court in and for the Eastern District of Texas, at Beaumont.

By C. C. BUMPAS,
Deputy.

AFFIDAVITS OF FORGERY MADE BY THOS. J.
BATEN AND E. E. EASTERLING.

Filed in U. S. District Court on Nov. 1, 1912.

Now comes Thos. J. Baten, one of the attorneys for the plaintiffs in the above entitled cause and upon his oath, deposes and says: That he has reason to believe and upon information and belief so avers the fact to be that the following deeds in the defendant Houston Oil Company's chain of title to the Chas. A. Felder survey of land involved in this suit are forgeries, to-wit:

1. A purported deed from Chas. A. Felder to Wm. A. Daniel, purporting to bear date June 10th, 1839, recorded in the deed records of the former County of Menard Sept. 23rd, 1842 and in Hardin County, July 26th, 1890 in Book P., page 561.

2. A purported deed from Wm. A. Daniels to Thos. J. Word, dated Feb. 5th, 1855, certified copy of which was filed for record in Hardin County, Texas, July 11th, 1900 and recorded in Vol. X, page 227.

3. A purported deed from Chas. F. Felder to Joshua Smith, dated May 21st, 1840, filed July 10th, 1890, recorded in Book P, page 553, Deed records of Hardin county.

Affiant further says that if the second deed above mentioned was in fact signed by one Wm. Daniels, the same is a spurious and fraudulent impersonation of Wm. A. Daniel mentioned in said first above named deed and not the act and deed of Wm. A. Daniel first mentioned.

Affiant says that he is one of the attorneys for the plaintiffs in the above entitled cause and as such, is authorized to make this affidavit.

THOS. J. BATEN.

I, E. E. Easterling, one of the attorneys for the interveners in the above entitled cause, do hereby, on behalf of said interveners, adopt the foregoing affidavit of Thos. J. Baten and make the same my affidavit on behalf of said interveners in all things as if literally repeated verbatim and thereunto sign my name to this affidavit of forgery, which I am authorized to make on behalf of the interveners.

E. E. EASTERLING.

Sworn to and subscribed before me on this 1st day of November, 1912, by Thos. J. Baten, attorney for the plaintiffs and E. E. Easterling, attorney for the interveners in the above entitled cause.

[Seal]

E. D. ANDREW,
Notary Public in and for Jefferson County, Texas.

AFFIDAVIT OF CHARLES T. BUTLER AS TO LOSS
OF CERTAIN DEEDS

Filed in U. S. District Court on Nov. 22, 1912.

Before me, the undersigned authority, on this day personally appeared Charles T. Butler, known to me to be a credible person, and being by me first duly sworn, deposes and says:

That the following original deeds, upon which the defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company, are relying upon the trial of the above styled and numbered cause to sustain the issue in their behalf, are lost, and that he cannot procure said original instruments for use upon the trial thereof, to-wit:

(1) Original deed from Charles A. Felder to William A. Daniels, dated June 10, 1839, conveying the Charles A. Felder league in Hardin County, Texas.

(2) Original deed from William A. Daniels to T. J. Word, dated February 5, 1855, conveying the Charles A. Felder league in Hardin County, Texas.

(3) Original deed from Charles A. Felder to Joshua Smith, dated May 21, 1840, conveying the Charles A. Felder league in Hardin County, Texas.

That affiant is one of the attorneys of record for the defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company, and is authorized to make this affidavit.

CHARLES T. BUTLER,
Affiant.

Sworn to and subscribed before me, this the 20th day of November, A. D. 1912.

J. R. BLADES,
Clerk of the United States District Court
in and for the Eastern District of
Texas, at Beaumont.

By C. C. BUMPAS, Deputy.

TRIAL AGREEMENT.

Filed in U. S. District Court on Nov. 26, 1912.

In order to facilitate a trial of the above and numbered cause, it is agreed that upon the trial either party, plaintiffs or defendants, may read in evidence from the printed record in the United States Circuit Court of Appeals for the Fifth Circuit, in cause No. 1997, styled Houston Oil Company of Texas et al, appellants, vs. Uriah A. Giddard, et al, appellees, any deeds or other evidence contained therein, subject, however, to all objections which might be made if said evidence had been originally offered in this cause in the manner and form provided by law.

It is expressly understood and agreed, however, that the provisions of the foregoing agreement do not apply to the purported deed from Charles A. Felder to John A. Veatch, dated June 18, 1839, to the purported deed from Charles A. Felder to William A. Daniels, dated June 10, 1889, to the purported deed from Daniels to Thomas J. Word, dated February 5, 1855, and the deed from Charles A. Felder to Joshua Smith, or any other instruments attacked herein as forgeries, as to which deeds plaintiffs herein make no agreement whatsoever.

Second.

Plaintiffs and defendants waive filing, notice of filing and affidavits of the loss of all original instruments which either party may desire to offer in evidence, save and except those attacked as forgeries, subject to all other legal objections.

Third.

It is further understood and agreed that the foregoing agreement in reference to reading from the record in the case

of Uriah Pollard vs. Houston Oil Company of Texas, shall not preclude either party from offering any other evidence it may desire to offer.

Witness our hands this 23rd day of November, A. D. 1912.

W. D. GORDON,

T. J. BATEN,

Attorneys for Plaintiffs.

HIGHTOWER, ORGAIN & BUTLER,

Attorneys for Defendants.

TRIAL AGREEMENT.

Filed in U. S. District Court on Nov. 26, 1912.

In the above styled and numbered cause it is agreed that the defendants herein may read from the printed record in the case of Houston Oil Company of Texas vs. Uriah A. Pollard, No. 1997 in the Circuit Court of Appeals at New Orleans, the following instruments, in addition to those which defendants and interveners have already agreed may be read from said record; subject to any other objections that might be otherwise urged:

(1) Deed from W. W. Swain to Uriah Pollard, dated August 13, 1847, printed at page 90 *et seq.* of said printed record.

(2) Deed from W. W. Swain to Benjamin H. Green, dated August 13, 1847, printed at page 82 of said record.

HIGHTOWER, ORGAIN & BUTLER,

Attorneys for Defendants.

H. M. WHITAKER,

Attorney for Interveners

TRIAL AGREEMENT.

Filed in U. S. District Court on Nov. 26, 1912.

In order to facilitate a trial of the above numbered and entitled cause it is agreed between defendants and interveners herein, acting through their respective attorneys, as follows:

First.

That either party may read in evidence such portions of the printed record in the case of Houston Oil Company of Texas vs. Uriah Pollard et al, No. 1997 in the Circuit Court of Appeals at New Orleans, as may be deemed proper by such party, except deeds contained therein which have been attacked as forgeries herein, and except the purported deed from James Morgan to W. W. Swain, dated November 21, 1844, printed at page 5 of said record, such record to be read, however, subject to all other objections that might be urged to such evidence if it had been originally offered in this cause in the manner prescribed by law.

Second.

Interveners herein waive the filing, notice and affidavits of the loss of originals of all deeds or title papers which the defendants may desire to offer in evidence, except the deeds from Charles A. Felder to William A. Daniels, William A. Daniels to T. J. Word, and Joshua Smith to T. J. Word, and James Morgan to W. W. Swain, all of which deeds are attacked by the interveners herein as forgeries, or otherwise as to their validity.

Third.

It is further understood and agreed that the foregoing agreement in reference to reading from the record in the case

of Uriah Pollard vs. Houston Oil Company of Texas, shall not preclude either party from offering any other evidence it may desire to offer.

Witness our hands this 23rd day of November, A. D. 1912.

HIGHTOWER, ORGAIN & BUTLER,
Attorneys for Defendants.

E. E. EASTERLING,
H. M. WHITAKER,
Attorneys for Interveners.

TRIAL AGREEMENT.

Filed in U. S. District Court on Nov. 26, 1912.

In the above styled and numbered cause it is agreed that the original of the deed dated February 5, 1855, in the body of which the grantor is described as William A. Daniels and the grantee is Thomas J. Word, and which purports to be signed William Daniel, his mark, acknowledged before A. D. Eubank, Notary Public Nacogdoches County, on February 5, 1855, recorded in volume B, page 566 of the Deed Records of Tyler County and in Volume X, page 227 of the Deed Records of Hardin County, of which the defendants herein will offer in evidence certified copies from said records, when last seen was among the papers of the case of Tabor vs. Colley in the Circuit Court of Appeals for the Fifth Circuit at New Orleans, that since that time said deed has been lost, and cannot now be procured by defendants herein. That defendants have made a sufficient search for said deed to admit secondary evidence of its execution, existence and contents.

W. D. GORDON,
Attorney for Plaintiffs.

H. M. WHITAKER,
Attorney for Interveners

HIGHTOWER, ORGAIN & BUTLER,
Attorneys for Defendants.

TRIAL AGREEMENT.

- Filed in U. S. District Court on Nov. 26, 1912.

In the above styled and numbered cause it is agreed between the plaintiffs, interveners and defendants, represented by their attorneys respectively, that filing and notice of filing of the purported original deed from Charles A. Felder to John A. Veatch, which is attacked as a forgery herein by defendants, is hereby waived. Defendants agree to submit said original deed to the plaintiffs and interveners herein for inspection in the office of Messrs. Hightower, Orgain & Butler on Sunday, December 1, 1912.

W. D. GORDON,

Attorney for Plaintiffs.

H. M. WHITAKER,

Attorney for Interveners.

HIGHTOWER, ORGAIN & BUTLER,

Attorneys for Defendants.

TRIAL AGREEMENT.

Filed in U. S. District Court on Nov. 26, 1912.

It is hereby agreed between the plaintiffs, interveners and defendants that all of the Deed Records and Court Records of Liberty County were destroyed by fire in the year 1874, and that the Clerks of the County Court of Liberty County who officiated from 1838 to 1840 inclusive, are dead. That James B. Arnett, first and only Clerk of the former county of Menard is dead.

That all parties hereto waive the recording of the judgments of courts in the Deed Records of Hardin County, Texas.

It is further agreed that the courthouse of Jasper County, Texas and all the records contained therein were destroyed by fire in the latter part of the year 1849; that John Frazier was County Clerk of said county at said time, having been elected to that office, and having received his commission in 1848; that said John Frazier is now dead.

T. J. BATEN,
W. D. GORDON,
Attorneys for Plaintiffs.

HIGHTOWER, ORGAIN & BUTLER,
Attorneys for Defendants.

E. E. EASTERLING,
Attorney for Interveners.

TRIAL AGREEMENT.

Filed in U. S. District Court on Nov. 26, 1912.

In the above styled and numbered cause it is agreed that John P. Irvin, would testify, if personally present, that he has not in his possession any of the original deeds attacked herein as forgeries, nor does he know the whereabouts of the same.

Witness our hands at Beaumont, Texas, this the 26th day of November, A. D. 1912.

W. D. GORDON,
Attorney for Plaintiffs.

E. E. EASTERLING,
Attorney for Interveners.

HIGHTOWER, ORGAIN & BUTLER,
Attorneys for Defendants.

TRIAL AGREEMENT.

Filed in U. S. District Court on Nov. 21, 1914.

I.

It is agreed by all parties to this suit that either party may read any testimony given on the former trial of this cause, as contained in the printed transcript of record as filed in the United States Circuit Court of Appeals, at New Orleans, upon the appeal of this cause, subject, however, to all objections of every kind and character that could be made were said witnesses produced in person before the Court.

II.

Except as hereinafter set forth, it is agreed by all parties to this suit that either party may read any documentary evidence of any kind or character whatsoever, or offer any documentary evidence of any kind or character whatsoever, as contained in the printed transcript of record as filed in the United States Circuit Court of Appeals, at New Orleans, on the appeal of this cause, subject, however, to all objections of any kind and character whatsoever that could be made were the originals of said documents, or copies thereof, produced and offered before the Court. Save and except that this agreement shall not apply to the following instruments:

(a) To the purported deed from Charles A. Felder to John A. Veatch, dated June 18, 1839.

(b) To the purported deed from Charles A. Felder to William A. Daniels, dated June 10, 1839.

(c) To the purported deed from William A. Daniels to Thomas J. Word, dated February 5, 1855.

(d) To the purported deed from Charles A. Felder to Joshua Smith, dated May 21, 1840.

(c) To the purported deed from James Morgan to W. W. Swain, dated November 21, 1844.

Except as to the above five deeds, filing and notice of filing originals or certified copies, and affidavit of loss of originals is hereby waived by all parties.

III.

It is understood, however, that this agreement, as to reading from the said record, shall not preclude either party from offering any other evidence it may desire to offer, or from offering in any other way the same matters contained in said record, subject to all legal objections.

W. D. GORDON,

THOS. J. BATEN,

Attorneys for Plaintiffs, Cornelia
G. Goodrich, et al

H. M. WHITAKER,

E. E. EASTERLING,

Attorneys for Interveners Fannie
M. Allen, et al

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants, Hous-
ton Oil Company of Texas,
Kirby Lumber Company, and
Maryland Trust Company.

BILL OF EXCEPTIONS.

Filed in U. S. District Court on Feb. 3, 1915.

It is remembered, that upon the trial of the above styled and numbered cause, in the District Court of the United States for the Eastern District of Texas, at Beaumont, from November 17, 1914, to December 3, 1914, both dates inclusive, the following proceedings were had and the following evidence was introduced by the plaintiffs, interveners and defendants, to sustain the issue on their part, and the following evidence is all the evidence introduced or offered by either of said parties, together with objections thereto, upon the trial of said cause.

The defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, presented in open court their Motion for Restitution, and two Trial amendments thereto, and arguments thereon were heard, and thereupon the court entered the following order:

On this, the 17th day of November, 1914, in open court, came on to be heard the motion of the Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company, that the property heretofore taken from the possession of said parties under process of this court under and by virtue of former judgment rendered in this cause, be restored to them, and that they have restitution thereof. Said parties, upon motion, are permitted to file first and second trial amendments to their said motion.

Whereupon came the plaintiffs and interveners, against whom said motion is filed, and pressed, by their attorneys, to-wit: W. D. Gordon, Esq., T. J. Baten, Esq., E. E. Easterling, Esq., and H. M. Whittaker, Esq., and file herein their

exceptions and demurrers to said motion and the two amendments thereto.

And the court, having heard and fully considered said motion upon said demurrers, only, withholds its ruling upon said demurrers and said motion for the present, except that said motion, insofar as it prays that proceedings in this cause be stayed until said motion has been heard and determined, and until the parties have made restitution of the property so received by them, is denied, to which ruling of the court the said Houston Oil Company of Texas, the said Kirby Lumber Company, and said Maryland Trust Company, in open court, except.

Done at Beaumont, this the 17th day of November, A. D. 1914.

GORDON RUSSELL,
Judge U. S. District Court, at Beaumont.

Mr. Gordon offers in evidence the testimonio of the original title to this land to Charles A. Felder, under the hand and seal of Jorge Antonio Nixon, Commissioner. This document was filed in this court December 4, 1912, and is entirely in the Spanish language. In connection with this document, we offer a translated copy in the English language, which was filed in this court December 4, 1912, showing that this land was granted on the 29th of August, 1835, by Jorge Antonio Nixon, Commissioner, to Charles A. Felder.

To the Special Commissioner of the Enterprize of Lorenzo de Zavala.

Charles A. Felder, a native of the U. S. of the North, with due respect, I present myself before you and say: That being induced by the generous dispositions of the Colonization laws

of this State, I have come with my family consisting of six persons, being married, to settle permanently in the same, should you deem proper on view of the annexed certificate to admit me as a Colonist, and grant to me the quantity of land to which I am entitled on the vacant territory of the same, being a farmer. Therefore, I pray you will deign to accede to my petition, it being what I expect from your well known justice.

Nacogdoches August 8th 1835.

CHARLES A. FELDER.

Provision: The party will pass with the accompanying Certificate to the Empresario to whom it belongs, that he may inform me in relation to the foregoing petition.

Nacogdoches August 8th 1835.

GEORGE ANTO. NIXON Comr.

Report: Mr. Commissioner.

I Certify that the party is one of the Colonists which my principal has introduced in fulfillment of the contract that he has ratified with the Supreme Government of the State, on the 12th day of March 1829. Therefore you may issue the order for the survey of the land, that he has solicited.

Nacogdoches August 8th 1835.

LORENZO DE ZAVALA by his
Atty. ARTHUR HENRIE.

Decree: Nacogdoches August 8th 1835.

Being presented and admitted, with the accompanying documents; The Surveyor Citizen D. Brown, will cause a Survey to be made of the league of land that the party will designate, provided the same be entirely vacant, and the notes there-

of he will examine, and they will be translated in this office, to be acted on subsequently as may be deemed advisable, and I sign it with two witnesses according to law.

GEORGE ANTO. NIXON Comr.

Ass. Witness

JOSEPH CANIERE

Ass. Witness

WILLIAM PRISSICK

Notes of Survey: Mr. Commissioner.

The land surveyed for the Colonist Charles A. Felder, is situated on the Western side of the Neches River, and begins at the 1st corner of the Survey of Montgomery, which forms the 1st landmark of this Survey, where Set a Stake and raised a mound of Earth at the foot of the Same, from which a Cypress 12 inches in dia. bears N $73^{\circ} 15'$ W. 4 8/10 vs. And another Cypress bears S $10^{\circ} 45'$ E. 4 vs. From thence West 9810 vs. where set a Stake for the 2nd Corner, and is the N. W. of this Survey. From which there was measured South 2500 vs. where Set a Stake for the 3d landmark, which is the S. W. Corner of this Survey; From which East 10635 vs. where set a Stake on the West bank of said River, being the S. E. corner of said Survey, and the 4th and last of this Survey; from thence down the River, with the meanders of the Same, to the place of beginning; thus completing the Survey of the league of land that you ordered me to have Surveyed: Of the aforesaid land 10. labors belong to the Arable Class, and the 15. remaining labors to the pasture Class, its figure being that which is represented in the duplicate map, which accompanies this: Nacogdoches Aug. 25th 1835.

JOSEPH CANIERE
Translator.

DAVID BROWN,
Surveyor.

Decree: Nacogdoches August 25th 1835.

The Survey of the league of land for the Colonist Charles A. Felder being completed, let the proper title be issued, and of the two maps, that were presented by the Surveyor, let one be annexed to this instrument, and the other to the "testimonio," both being rubricated by me, thus I determine and sign it with two witnesses according to law.

Ass. Witness
JOSEPH CANIERE

GEORGE ANTO. NIXON Comr.
Ass. Witness.
WILLIAM PRISSICK.

Title of Possession: The Citizen George Antonio Nixon, Specially Commissioned by the Supreme Government of the State of Coahuila and Texas, for the partition and possession of lands, and the issuing of titles to the Colonists in the Colonization Enterprize of the Empresario Citizen Lorenzo de Zavala.

Whereas Charles A. Felder has been admitted as a Settler in the Colonization Enterprize, contracted by the Empresario Citizen Lorenzo de Zavala, with the Supreme Government of of the State, on the 12th day of March 1829. And the aforesaid Charles A. Felder, having fully proven that he has a family, and finding in him the qualifications required by the Colonization law of 24th March 1825, in conformity with said law, and those instructions which guide me, in the Name of the State, I concede, confer and put the aforesaid Charles A. Felder, in real and personal possession of one league of land, Situated on the West bank of the River Neches the lines of which are delineated on the map and notes of Survey, made by the Surveyor Citizen D. Brown, as will be seen in this instrument, 10 labors of the aforesaid land pertains to the arable

class and the remainder to the pasture Class, which Serves as a classification for which he shall satisfy the State, according to the 22nd Article of said law, granting to him the terms therein designated; under the penalties therein established; being notified that within one year, he shall construct fixed and permanent landmarks at each angle of the land, and that he shall settle and cultivate it, in conformity with the provisions of the law, complying scrupulously with all ordained in it and other enactments on the subject, and that it shall never pass into Mortmain.

Therefore by Virtue of the Authority vested in me by the proper law, and pursuant instructions, I issue the present title, and order that a "testimonio" be taken of it, and the same be delivered to the party interested that he may possess, and enjoy the land, he, his children, heirs and successors, or whoever of him, or of them may become entitled to the same. Given at the Town of Nacogdoches on the 29th day of August 1835. And I sign it with two assisting witnesses according to law.

GEORGE ANTO. NIXON Comr.

Ass. Witness

JOSEPH CANIERE

Ass. Witness.

WILLIAM PRISSICK.

Mr. Gordon: We next offer in evidence original deed from Charles A. Felder to John A. Veatch, dated January 18, 1839, and acknowledged on the same day before John Bevil, Chief Justice and ex officio Notary Public of Jasper County, and filed in Liberty County, Texas, October 21, 1839, and duly recorded in Book D, p. 46, on November 4, 1839.

"Republic of Texas,
County of Jasper.

Be it remembered that this 18th day of June A. D. 1839 I Charles A. Felder of the County of Shelby and Republic above named have this day for and in consideration of the sum of One Thousand five hundred dollars to be in hand paid by John A. Veatch of the County of Sabine and Republic above named the receipt whereof is hereby acknowledged have this day bargained sold aliened conveyed confirmed and passed over and by these presents do hereby bargain sell alien convey confirm and pass over in full perfect and bonafide sale to the same John A. Veatch his heirs and assigns all my right, title claim and interest in to & for a certain league of land the same being granted to me as my headright as a Colonist *in the Colony* in the Colony of Lorenzo de Zavalla as will more particularly appear by a reference to the title granted to me by George Antonio Nixon the said land lying and being on the West bank of the Neches River commencing on the South East corner of Donnie C. Montgomery Survey and having the marks and boundaries as set forth in the title above named to have and to hold the above named league of land with all its rights rents issues profits members and appurtenances thereunto being in belonging or in any wise appertaining to the said John A. Veatch his heirs and assigns in fee simple forever and the said Charles A. Felder my heirs executors and administrators the said bargained league of land to the said John A. Veatch heirs executors administrators and assigns shall and will warrant and forever defend against the claim of myself my heirs executors administrators and assigns and against the lawful claim of all persons whomsoever claiming or to claim the same. And I the said Charles A. Felder do hereby renounce and remove all laws as well as matters of form which might in any manner impair the validity of this deed of sale.

In faith of all of which I the said Chas. A. Felder have hereunto set my hand and affixed my seal this day and date above named.

Attest. W. B. BARNETT. CHAS. A. FELDER (Seal)
SAML. PALMER.

Republic of Texas,
County of

Before me John Bevil, Chief Justice and Exofficio Notary Public of Jasper personally appeared the within named Charles A. Felder who acknowledged that he signed the within document or deed of Sale for the purposes therein specified.

Given under my hand and seal of office this 18th day of June A. D. 1839.

(Seal)

JOHN BEVIL
Ch Jus. Exofficio Not. Pub.

Republic of Texas,
County of Liberty.

Presented for record in my office on the twenty-first day of October in the year 1839.

GEO. W. MILES
Recorder Liberty Co

I do certify that the within deed was registered in my office Book D page 46 on the fourth day of November in the year 1839.

In witness whereof I have hereunto set my hand and seal of office in the town of Liberty date before written.

GEO. W. MILES R. L. Co.
JAS. B. ARNETT R. M. Co."

State of Texas,
County of Hardin.

I, E. H. Collins, Clerk of the County Court in and for said County and State, do hereby certify that the above and attached instrument of writing was filed in my office for record June 18, 1889, at 3:00 P. M. and was by me duly recorded June 19, 1889, at 8:00 A. M. in Book O, page 385-386.

Given under my hand and seal of office in Kountze on this June 19, A. D. 1889.

Filed for Record June 18, 1889 at 3:00 P. M. E. H. Collins, C. C. C. H. C. Received for record on the 16th day of September, 1841.

JAS. B. ARNETT, Co. Recorder M. C.

Republic of Texas,
County of Menard.

This is to certify that the foregoing deed and certificates were duly registered in my office on the 16th day of September, A. D. 1841, in record Book "A," pages 72-73, in testimony whereof, I have hereunto set my hand and affixed my private seal, there being no seal of office date above mentioned.

JAS. B. ARNETT, Co. Recorder M. C.

Mr. Lee: The defendants, and each of them object to the introduction of this instrument in evidence, because:

1. There is an affidavit of forgery on file as to this instrument.
2. Because it is accompanied by no evidence as to the payment of the purchase price recited in the deed, and the proof will show that this deed, being dated June 18, 1839, is junior to the deed from Charles A. Felder to William A. Daniels, and, therefore, this instrument would be no evidence of title to the land in controversy, unless accompanied by proof of the payment of the purchase price recited in the deed, and the fact that it was taken without notice of the senior unrecorded deed.
3. That the deed of itself is in effect a quitclaim deed, and the proof will show that the property mentioned in this instrument had been parted with by the grantee by a previous deed, dated June 10, 1839, to William A. Daniels, and therefore the purported grantee had no title to convey at the date of the execution of the instrument.
4. We further object to it on the ground that an affidavit of forgery has been filed, and the execution of the instrument has not been proven.

5. We further object on the ground that the instrument does not come from the proper custody, and on its face is not free from suspicion, and an affidavit of forgery having been filed, the offer of the deed is not accompanied by any acts of assertion of ownership, payment of taxes or assertion of title thereunder sufficient to admit it in evidence.

The Court: The second and third objections, in the opinion of the court, go rather to the legal effect of the deed than to its admissibility in evidence. The first, fourth and fifth objections I will reserve the ruling upon to await the offering of further testimony, if it shall be done.

Defendants except.

The Court: I will suggest that when plaintiffs and interveners close their case, you call attention to the reserved rulings.

Mr. Gordon: I want noted that this instrument was also recorded in the Menard County Records, on the 10th of September, 1841, Book A, pp. 73 and 74.

Mr. Gordon reads instrument to the jury and exhibits the same to them.

Mr. Gordon: This same instrument was recorded in Hardin County, June 18, 1889, Book O, pp. 385-6.

Mr. Gordon reads from the printed record of the previous trial the testimony of John H. Walker, beginning on p. 96.

JOHN H. WALKER, a witness for the plaintiffs, testified as follows:

Questioned by Mr. Gordon:

Q. Where do you live? A. At Waterbury, Conn.

Q. Have you the original deed purporting to have been executed by Charles A. Felder to John A. Veatch in 1839?

A. I don't remember the date.

Q. Well, that is the date of it? A. Yes, sir.

Q. Where did you get that deed, Mr. Walker? A. I got it from my father's papers.

Q. What was your father's name? A. James H. Walker.

Q. Where did he live? A. At Westbrook, Conn., when he died.

Q. When did he die? A. In 1907.

Q. How long did he have possession of the deed? A. Since my grandfather's death, and possibly before.

Q. Where did he die? A. On Long Island.

Q. What was his name? A. William Walker.

Q. Did he ever live in New Orleans? A. Not to my knowledge.

Q. Have you the original deed purporting to have been executed by Charles A. Felder to John A. Veatch in 1839?

A. I don't remember the date.

Judge Kennerly: We object to the second question and answer at the top of p. 97, and the answer thereto, because it is a conclusion of the witness, and the answer shows he has no personal knowledge of it, and that it is a supposition. (Question and answer are as follows):

Q. How long did your grandfather have possession of this deed? A. I should think since 1846. I suppose he must have had it since then. No, he had had it since in 1848.

Objections overruled.

Defendants except.

Q. Did he claim title to the land under this deed? A. Yes, sir, I suppose so.

Judge Kennerly: We object to the answer to the question, "Did he claim title to the land under this deed?" for

the same reasons. It shows no personal knowledge of the matter.

Objections overruled.

Defendants except.

Q. Do you know whether or not your grandfather and your father claimed title to the land under this deed? A. I don't know except that I have had this deed in my possession: I suppose he claimed it.

Mr. Gordon offers in evidence original deed from John A. Veatch, executed March 15, 1841, to James Morgan, acknowledged before R. D. Johnson, Chief Justice of Galveston County March 17, 1841, and witnessed by W. D. Lee and Robert Rose, recorded in Vol. F pp. 74 and 75, Menard County Records, afterwards filed June 18, 1889 and recorded in Vol. O p. 387 of the Deed Records of Hardin County Texas.

"Republic of Texas,

County of Galveston. This Indenture made this fifteenth day of March, in the year of our Lord one thousand and eight hundred and forty-one between John A. Veatch of the County of Jasper of the one part and James Morgan of Harris, of the other part, witnesseth: That the said John A. Veatch for and in consideration of the sum of five thousand dollars to him by the said James Morgan in hand paid the receipt whereof the said John A. Veatch doth hereby acknowledge hath granted, bargained, sold and conveyed and by these presents doth grant, bargain, sell and convey unto the said James Morgan, his heirs and assigns all that tract or parcel of land comprising one league of land situated on the west bank of the Neches River in the Northern Division of the County of Liberty, granted to Charles A. Felder as a Colonist in Zavala's Colony by the State of Coahuila and Texas, as pr. title from the Commissioner George A. Nixon bearing date at Nacogdoches the 29th August

1835 and sold and conveyed by said Felder to me by deed bearing date in the County of Jasper on the 18th day of June, 1839, both of which are hereby made and constituted part of this instrument. To have and to hold the said league of land with the appurtenances thereto belonging to him the said James Morgan and his heirs and assigns and to the said James Morgan and his heirs and assigns and to the only proper use and behoof of the said James Morgan & his heirs and assigns forever, and the said John A. Veatch for himself & his heirs, executors and administrators doth hereby covenant and agree to and with the said James Morgan and his heirs and assigns that he the said John A. Veatch and his heirs the said league of land with its appurtenances unto him the said James Morgan his heirs and assigns against him the said John A. Veatch and his heirs and all other persons whomsoever shall and will by these presents forever warrant and defend.

In witness whereof the said John A. Veatch hath hereunto set his hand and affixed his seal the day and year first herein written.

JOHN A. VEATCH (Seal)

Signed sealed and delivered in the presence of

W. D. LEE.

ROBT. ROSE.

Republic of Texas,

County of Galveston. Personally came and appeared this 17th day of March, 1841, before me Robert D. Johnson, Chief Justice and ex officio Notary Public in and for the county aforesaid, John A. Veatch, who acknowledged the foregoing instrument to be his act and deed for the purposes in the same set forth.

To certify which as authentic I grant these presents under my hand and seal of office at Galveston, the day and date above written.

R. D. JOHNSON, Ch Jus. & Exoff.

(Seal)

N. P. G. C.

Republic of Texas,

County of Menard. This is to certify that the foregoing deed of conveyance and certificate were duly registered in my office on the 16th day of September, 1841, in record Book F. pages 74 and 75.

In testimony whereof I hereunto set my hand and affix my private seal there being no seal of office date above mentioned.

JAS. B. ARNETT,

(Seal)

Co. Recorder M. C.

Mr. Lee: Defendants object to this instrument because:

1. It purports to pass title from the grantor to the grantee, and it is not shown that there was any title in the grantor at the time the instrument was executed.

2. The execution of the deed from Felder to Veatch has not been proven.

3. We object to the recitation in the deed that the league of land was sold and conveyed by Felder to the grantor in this deed by deed dated June 18, 1839, on the ground that such recitation is a self-serving declaration and therefore inadmissible, and is hearsay insofar as these defendants are concerned.

4. We further object to the introduction of the deed and as to the recitations therein on the ground that the execution of the deed from Felder to Veatch has not been proven, and we further object to the introduction of the deed insofar as it recites the payment of any consideration whatever.

The Court: The first and second objections reserved for future ruling, and the other objections are overruled.

Defendants except.

Mr. Gordon offers in evidence deed from James Morgan, without acknowledgment and signed by one witness, to W. D. Lee. I offer this deed on the issue of forgery made by

counsel, and do not offer it as a muniment of title. It is unacknowledged and related to the same league of land, but no portion of the land involved in this suit.

"This indenture made this 17th day of October, 1845, between James Morgan of the County of Harris Republic of Texas of the one part and William D. Lee of the County and the Republic aforesaid of the other part, witnesseth that the said James Morgan for and in consideration of the sum of two thousand dollars to him by the said William D. Lee in hand paid the receipt whereof the said James Morgan doth hereby acknowledge hath granted bargained sold and conveyed by these presence doth grant bargain sell and convey the said William D. Lee his heirs and assigns a certain tract or parcel of land containing eighteen hundred and fifty acres situated on the west bank of the river Neches, in the northern division of the County of Liberty, being a part of the league granted to Charles A. Felder as a colonist in Zavala's Colony by the state of Coahuila and Texas as per title from the commissioner George A. Nixon bearing date the 29th of August, 1835, the same having been sold and conveyed by said Charles A. Felder to John A. Veatch of the County of Jasper and by the last named conveyed to the said James Morgan to have and to hold the said eighteen hundred and fifty acres of land with the appurtenances thereto belonging to him. The said William D. Lee and his heirs and assigns for his and there only proper use and behoof forever, and the said James Morgan for himself his heirs executors and administrators doth hereby covenant and agree to and with the said William D. Lee his heirs and assigns that he the said Morgan relinquishes (the word is torn out) his heirs and assigns all the right title and interest in and to said land and appurtenances hereby conveyed.

In witness whereof the said James Morgan hath hereunto set his hand and affixed his seal the day and year herein first mentioned.

Witnesses

JOHN S. PRESTON.

J. MORGAN (Seal)"

Judge Kennerly: We object to the statement of counsel that the deed from James Morgan to W. D. Lee conveys no portion of the land involved in this suit, and ask that that be stricken from the record.

The Court: I will not admit any statements made by counsel during the progress of this case as to the reasons that impel them to offer testimony, or any comments as to the evidence. That is not evidence and the jury must not consider it. You must not consider what Mr. Gordon says about that matter.

Judge Kennerly: We controvert the statement he makes.

The Court: Gentlemen of the jury, just dismiss that from your minds. You have heard the statements of both counsel. Just disregard the matter entirely.

Judge Kennerly: It is understood that we object to the same recitations in this deed as in the former deed.

The Court: I overrule the objection. I only rule on the specific objection.

Defendants except.

Mr. Gordon: We read further from JOHN A. WALKER'S testimony in printed record, pp. 105 and 106:

The Court: He said this was with the other papers, did he? You asked him particularly about the first deed.

Mr. Gordon: I will do that.

Q. The deed from Dr. Veatch to James Morgan just read in evidence to the jury, where did you get that deed?

A. From my father's papers.

Q. Was it or not with the other deed from Felder to Veatch? A. Yes, sir, with the other papers.

Q. I will ask you where you got the deed that I hold

now in my hand from James Morgan to W. D. Lee, dated October 17, 1845? A. From my father's papers the same as the rest.

Q. The same as the rest and with the rest? A. Yes, sir.

Q. I will ask you whether or not your father was administrator of the estate of your grandfather? A. He was executor.

Q. Now, I will ask you whether or not your grandfather had any of these papers, and, if so, what papers? A. I suppose he had them.

Q. Where did your father get them? A. From my grandfather.

Q. From your grandfather? A. Yes, sir.

Judge Kennerly: We object to the fourth question and answer on p. 106 of the printed record, for the same reason, that it is a mere supposition and conclusion of the witness. Question and answer are as follows:

Q. How long have they been in your family? A. I know since my grandfather's death, and I don't know how long before, I suppose since their execution.

Objection overruled.

Defendants except.

Mr. Gordon: It is admitted that the W. D. Lee deed has never been acknowledged nor recorded.

Q. I will ask you if this original deed from W. D. Lee to Benjamin H. Green was also in the same papers? A. Yes, sir.

Mr. Gordon: We now offer in evidence deed from W. D. Lee to Benjamin H. Green, dated September 25, 1846, acknowledged in New York City before John H. Brewer, Com-

missioner of the State of Texas for the City of New York, on the 9th of October, 1846, and filed for record in Hardin County, Texas, June 18, 1889, and recorded in Book O, p. 389.

"This indenture made and entered into this 25th day of September A. D. one thousand eight hundred and forty-six between William D. Lee of Harris County of the State of Texas of the first part and Benjamin E. Green now of the City of Washington, D. C. of the second part Witnesseth That the said William D. Lee for and in consideration of the sum of one dollar and acre to him in hand paid and the receipt whereof is hereby acknowledged, hath granted bargained and sold and by these presence doth grant bargain and sell enfeoff and convey unto the said Benjamin E. Green, his heirs and assigns a certain tract or parcel of land containing eighteen hundred and fifty acres situated on the west bank of the river Neches, in the northern division of the county of Liberty, in the State of Texas, being a part of the league granted to Charles A. Felder as a colonist in Zavallas colony by the state of Coahuila and Texas, as per title from the commissioner George A. Nixon bearing date the twenty-ninth day of August 1835, the same having been sold conveyed by said Charles A. Felder to John A. Veatch of the County of Jasper, Texas, and by the last named sold and conveyed to James Morgan of Harris County in the said state and by the said Morgan sold and conveyed to the said William D. Lee, to have and to hold the said eighteen hundred and fifty acres of land with the appurtenances thereunto belonging to him, the said Benjamin E. Green and his heirs and assigns for his and their only proper use and behoof forever, and the said William D. Lee for himself his heirs executors and administrators doth hereby covenant and agree with the said Benjamin E. Green his heirs and assigns that he the said William D. Lee is the rightful and legal owner of the said tract or parcel of land, and that he hath full and legal authority to sell the same, and that he the said Lee relinquishes to the

said Benjamin E. Green his heirs or assigns all his right title and interest in and to the said land and appurtenances hereby conveyed, and hereby covenants warrants and defends unto the said Benjamin E. Green his heirs and assigns all the right title and interest in and to the premises aforesaid from all and every person or persons claiming or to claim the same from by or under him said William D. Lee in any manner what-so-ever, and the said William D. Lee further covenants and hereby binds himself his heirs, executors or administrators to make and execute such further deed or deeds as counsel learned in the law may deem to be necessary to vest title of the said tract or parcel of land in him the said Benjamin E. Green his heirs or assigns in testimony whereof the said William D. Lee hath hereto set his hand and affixed his (seal) the day and date afore-said W. D. Lee, signed, sealed and delivered in the presence of T. P. Brown (Seal)

.....
JOHN I. BERRÉT.

WM. D. LEE.

State of New York.
City of New York.

I, John H. Brown commissioner of the State of Texas for the city of New York do hereby certify that before me this day came William D. Lee who is personally known to me and who in my presence duly acknowledged his signature and seal to the foregoing Indenture as and for his free act and deed in testimony whereof I have hereto affixed my official seal and subscribed my name this ninth day of October in the year 1846.

(Seal)

J. H. BROWN.

State of Texas,)
County of Hardin.)

I, E. H. Collins, clerk of the County Court in and for said state and county do hereby certify that the above and foregoing instrument of writing was filed in my office for record June 18th, 1889, at 3 o'clock P. M. and

was by me duly recorded June 19th 1889 at 2 o'clock P. M. in book "O" on pages 389 and 390, given under my hand and seal of office in Kountze on this 19th day of June A. D. 1889.

E. H. COLLINS.
C. C. C. H. C.

(Seal)

William D. Lee

to

Benj. E. Green

Filed for record June 18, 1889 at 3 o'clock P. M.

E. H. COLLINS

C. C. C. H. C."

Judge Kennerly: We make the same objections to the recitations in that deed. We also object as wholly immaterial and irrelevant to any issue in this case.

The Court: Both objections overruled.

Defendants except.

Mr. Gordon: We now offer in evidence the original deed from Benjamin E. Green to Richard C. Washington, dated September 9, 1848, filed for record on the 9th day of August, 1849, in Tyler County, Texas, and filed for record in Hardin County, Texas, on the 18th of June, 1889. This deed is acknowledged by the grantor before the Secretary of State of the United States, with the seal of the Department of State affixed, on the 12th of September, 1848.

"This indenture made and entered into this 9th day of September A. D. 1848 between Benjamin E. Green of Washington D. C. of the first part, and Richard C. Washington of the same city of the second part, Witnesseth that the said Benjamin E. Green for and in consideration of one dollar per acre in hand paid the receipt whereof is hereby acknowledged, hath granted, bargained and sold and by these presence doth grant,

bargain, sell alien enfeoff and convey to the said Richard C. *Witnesseth* his heirs and assigns a certain tract or parcel of land containing eighteen hundred and fifty acres, situated on the west bank of the river Neches in the northern division of the County of Liberty in the State of Texas being a part of the league granted to Charles A. Felder as a colonist in Zavala's Colony by the State of Coahuila and Texas, as per title from the commissioner George A. Nixon, bearing date 29th day of August, 1835, the same having been sold and conveyed by said Charles A. Felder to John A. Veatch and by said Veatch sold and conveyed to James Morgan and by said Morgan sold and conveyed to William D. Lee, who sold and conveyed the same to Benjamin E. Green aforesaid by deed bearing date 25th day of September, 1846, to have and to hold the said eighteen hundred and fifty acres of land with the appurtenances thereunto belonging to him the said Richard C. Washington, and his heirs and assigns for his and their only proper use and behoof forever, and the said Benjamin E. Green for himself, his heirs executors and administrators hereby covenant warrants and defends with and unto the said Richard C. Washington, his heirs and assigns all the right title and interest of in and to the said tract or parcel of land from all and every person or persons claiming or to claim the same by from or under him said Green, in any manner whatsoever in testimony whereof the said Benjamin E. Green hath thereto set his hand and sealed this day and year first above written.

BEN E. GREEN, (Seal)

Witnesses

S. S. WHITING.

R. P. STOW.

District of Columbia.

Washington County.

I, T. Hartley Crawford, Judge of the United States criminal court for the district and county aforesaid do hereby certify that before me this day came Benjamin E. Green, the party of the first part to the foregoing deed who is personally known to me and who in my

presence duly acknowledged his signature and seal for the foregoing indenture as and for his free act and deed given under my hand and seal this 11th day of September A. D. 1848.

T. HARTLEY CRAWFORD. (Seal)

United States of America
Department of State.

To all to whom these presents shall come, Greeting. I certify that T. Hartley Crawford, whose name is subscribed to the paper hereunto attached, was, on the 11th day of September, 1848, Judge of the United States Criminal Court, for the County of Washington, in the District of Columbia, duly commissioned, and that as such his acts are entitled to full faith and confidence.

In testimony whereof, I, Isaac Toucey Acting Secretary of State of the United States, have hereunto subscribed my name, and caused the seal of the department of the State to be affixed, done at the City of Washington, this 12th day of September A. D., 1848.

And of the independence of the United States of America the 73rd.

(Seal)

ISAAC TOUCEY.

State of Texas
County of Tyler.

I do hereby certify that the foregoing instruments are duly recorded in my office in record book A on pages 146, 147 and 148 on this 17 day of August, A. D. 1849 at 11 A. M.

Given under my hand and seal of office in the Town of Woodville day and date last above written.

E. J. PARSONS,
County Clerk of Tyler Texas.

State of Texas
County of Hardin.

I, E. H. Collins, Clerk of the County Court, in and aforesaid county and state do hereby certify that the above and foregoing instrument of writing was filed in my office for record June 18th, 1889, at 3 o'clock P. M.

and was by me duly recorded June 19th, 1889, at 5 O'o P. M. in Book O, on pages 391, 392 and 393.

Given under my hand and seal of office in Kountze on the 19th day of June, A. D. 1889.

(Seal)

E. H. COLLINS.

Ben E. Green
to Deed

Richard C. Washington.

Filed for record June 18th, 1889 at 3 o'clock P. M.

E. H. COLLINS

C. C. C. H. C.

Tyler County Filed in my office for record this 9th day of August A. D. 1849, at 6 A. M.

E. J. PARSONS, Co. Clerk T. Co."

Mr. Lee: We make the same objections to this instrument and as to the recitations contained in it.

Objections overruled.

Defendants except.

Mr. Gordon offers in evidence deed dated the 22nd of September, 1848, from Richard C. Washington and Sophia Washington, his wife, to William Walker, of the District of Columbia, City of Washington. It is authenticated by the Secretary of State of the United States, James Buchanan, afterwards President, on the 4th of October, 1848. This deed was recorded in Tyler County, on the 17th of August, 1849, and June 18, 1889, in Hardin County.

"This indenture made this 22nd day of September in the year 1848, between Richard C. Washington and Sophia Washington, his wife, of the City of Washington and District of Columbia of the one part, and William Walker of the same place of the other part Witnesseth, That the said Richard C. Washington and Sophia Washington, his wife, for and in consideration of the sum of one dollar an acre to them in hand paid by the said William Walker at or before the sealing and

delivery hereof receipt of which they do hereby acknowledge, have granted, bargained and sold, alien enfeoff and convey by these presence do grant bargain and sell alien enfeoff and conveyed unto the said William Walker, his heirs and assigns, a certain tract or parcel of land containing eighteen hundred and fifty acres, situated on the west bank of the river Neches in the northern division of the county of Liberty in the state of Texas, being a part of the league granted to Charles A. Felder as a colonist in Zavala Colony, by the state of Coahuila and Texas, as per title from the commissioner, George A. Nixon, bearing date 29th day of August, 1835, the same land having been sold and conveyed by the said Charles A. Felder to John A. Veatch of the County of Jasper, and said state of Texas, and by the last named sold and conveyed to James Morgan of Harris County of said state, and by the said Morgan sold and conveyed to William D. Lee of Harris County in the state of Texas, and by said Lee sold and conveyed to Benjamin E. Green in the city of Washington, District of Columbia, and by him the said Green sold and conveyed to the aforesaid Richard C. Washington, with all and singular the rights privileges and appurtenances to the same belonging or in any way appertaining, to have and to hold the said tract or parcel of land with all and singular premises and appurtenances to and unto him the said William Walker his heirs and assigns for his and their sole use and behoof forever, and the said Richard C. Washington for himself, his heirs, executors and administrators doth hereby covenant and agree to and with the said William Walker, his heirs and assigns that he, the said Richard C. Washington is the rightful and legal owner of the said tract or parcel of land, and that he had full and legal authority to sell the same, and that he the said Washington, relinquishes to him, the said Walker, his heirs and assigns all his right, title, interest, property, claim and demand in and to the said land premises hereby conveyed or intended so to be and also that he will forever warrant and defend unto the said William Walker, his heirs and assigns all the said tract or parcel of land and all the right, title and interest

of him, the said Richard C. Washington, in and to the same from all person or persons claiming or to claim the same in any manner what-so-ever, and he, that said Washington further covenants and agrees for himself, his heirs, executors and administrators to make and execute such other and further conveyances as he the said William Walker, his heirs or assigns or his or their counsel learned in the law may deem necessary, for the better and more perfect conveyances and assuring the said tract or parcel of land and premises aforesaid to him the said William Walker his heirs and assigns, in testimony whereof the said Richard C. Washington and Sophia, his wife, hath hereto severally set their hand and affixed their seal the day and year first above written. 'The word and acre having been first enterlined in the seventh line of the first page.' Signed seal and delivered in the presence of

T. HARTLEY CRAWFORD

J^{no}. A. LINTON

R. C. WASHINGTON (Seal)

SOPHIA M. WASHINGTON. (Seal)

District of Columbia,
Washington County.

I, T. Hartley Crawford, Judge of the United States Criminal Court for the District of Columbia, County aforesaid, same being a court of record, do hereby certify that before me this day came Richard C. Washington party of the first part of the foregoing deed, who is personally well known to me, and who in my presence duly acknowledged his signature and seal to the foregoing Indenture as and for his free act and deed, and I do further certify that before me on the same day came Sophia Washington, his wife, of the aforesaid Richard C. Washington, she being personally well known to me to be the person who signed the foregoing deed, and being examined apart from and out of the hearing of the said husband and having the said deed fully explained to her, acknowledged her signature and seal to the same for her own free act and deed, and that she

had willing signed, sealed, and delivered the same and wish not to be retract.

Given under my hand and seal on this the 22nd day of September, 1848.

T. HARTLEY CRAWFORD (Seal)

Department of State

To all to whom these Presents shall come Greeting

I certify that I, Hartley Crawford, whose name is subscribed to the paper hereunto annexed is now and was at the same time of subscribing the same Judge of the United States Criminal Courts for the county of Washington in the district of Columbia..... duly commissioned and that full faith and confidence are due to his acts as such.....

In testimony whereof, I James Buchanan..... Secretary of the United States have hereunto subscribed my name and caused the seal of the department of state to be affixed. Done at the city of Washington this 4thday of October, and of the independence of the United States of America 73, A. D. 1848.

(Seal)

JAMES BUCHANAN

State of Texas

Tyler of County.

This is to certify that the foregoing instruments are duly recorded in my office in record book A, on pages 148, 149 and 150 on this 2nd day of August, 1849 at 3 P. M.

Given under my hand and seal of office in the town of Woodville of the day and year last above written.

E. J. PARSONS

County Clerk T. Co. Tex.

State of Texas

County of Hardin.

I, E. H. Collins, Clerk of the County Court in and for said county and state do hereby certify that the foregoing instrument of writing was filed in my office for record June 18th, 1889, at 3 o'clock P. M. and was by me duly recorded June 21, 1889, at 8 o'clock A. M. in book O, on pages 393, 394, 395 and 396.

Given under my hand and seal of office in Kountze
on the 21st day of June, A. D. 1889.

(Seal)

E. H. COLLINS, CCC H C

Richard C. Washington

to

William Walker

Filed for record June 18, 1889 at 3 o'clock P. M.

E. H. COLLINS, C C C H C"

Judge Kennerly: You made a restricted offer of the first deed, the one from Morgan to Lee, do you offer the others the same way?

Mr. Gordon: I offer all these deeds as circumstances showing the charge of forgery is not true. They are offered on the issue of forgery and accounting for the custody of the papers.

Mr. Whitaker: They are offered as accounting for the possession of the instruments, and not as a concession that he had the title. They are offered to show proper custody.

Mr. Lee: We object for the same reasons as to the previous deeds.

Objections overruled.

Defendants except.

Judge Kennerly: We make the same objections.

The Court: The same ruling and the same exceptions reserved.

Q. Now, I will ask you whether or not you received from the same source the Spanish document which I hold in my hand? *A.* Yes, sir; the same source.

Mr. Gordon: I desire to state that I will bring a Spanish translator here to translate this document later. It is the testimonio of the grant in Spanish of this league of land.

Judge Kennerly: We object to it because it is irrelevant and immaterial. We object to it for the reason that it is specially irrelevant in view of the fact and since the plaintiffs have introduced certified copy of the original grant from the General Land Office. That certified copy having been offered in evidence, this is not properly admissible as a link in their chain of title. We further object on the general ground that it does not come from the proper source and custody, the same objections we have been making all the way through.

The Court: It is not offered now for the purpose of deraigning title, but supplementary to the other proof they have offered to meet your attack on the deed. I can not tell what it is until I see the translation. I presume it is a copy of the grant.

Judge Kennerly: We make the objection that it is not written in the English language, and therefore not admissible in court.

The Court: If I don't get it intelligently translated, I will have to sustain the objection. I will overrule it for the present.

Mr. Gordon: It is a certified copy under the signature of Jorge Antonio Nixon, assisted by Jose Carriere and William Prissick as assisting witnesses.

Mr. Whitaker: The interveners adopt the same testimony as offered by the plaintiffs without the necessity of again offering it.

The Court: Yes, sir; it is in evidence for all purposes.

The witness, John A. Walker, on cross examination, testified as follows:

Questioned by Judge Kennerly:

Q. Can you hear me this far? A. If you speak loud I can.

Q. You say these papers you have produced here were among the old papers of your father? A. Yes, sir.

Q. How old a man are you? A. I am 41.

Q. You are 41? A. Yes, sir.

Q. How old was your father at the time of his death? A. 67.

Q. What year did he die? A. 1907.

Q. He lived until 1907? A. Yes, sir.

Q. Have you any tax receipts for the rendition of this property for taxes during your father's life and since that time? A. No, sir.

Q. Did you render it for taxes during all those years?

Mr. Gordon: We object to that as immaterial and irrelevant.

Objection overruled.

Plaintiffs except.

Q. Have you any tax receipts or have you seen any tax receipts issued to your grandfather for any taxes paid on this land during his lifetime? A. Repeat that again.

Q. Have you in your possession or have you seen any tax receipts evidencing the payment of taxes during the lifetime of your father? A. No, sir.

Q. Since his death the members of your family have not rendered the land for taxes? A. No, sir.

Q. Have you had anybody in possession of the land? A. No, sir.

Q. Did your father have anybody in possession of the land? A. Not to my knowledge.

Q. Did you ever exercise any acts of ownership over the land in the way of taking timber from it or in any way cultivating it or using it? A. No, sir.

Q. Did your father during his lifetime? A. No, sir.

Q. Did your grandfather during his lifetime? A. I don't know.

Q. Did you ever hear of anything of that kind, his exercising any acts of ownership over it? A. I suppose he must have when he bought it is all I know.

Q. There is an allegation of forgery in this case, and we are trying to establish what acts of ownership have been exercised over the land by parties holding under the deed; you say that none of them during their lifetime rendered the land for taxes or paid taxes on it, or had anybody in possession of it? A. Yes, sir.

Q. I asked you if your father during his lifetime exercised acts of ownership over it? A. No, sir.

Q. I believe you stated your father did not during his lifetime? A. I don't know.

Q. I say as far as you know? A. No, sir.

Q. There was nothing like that came down in the family? A. No, sir.

Q. And yet these instruments have been in possession of the family all these years? A. Yes, sir.

Q. That is the claim they have brought to the land? A. Yes, sir; we tried to find where the land was; tried to locate it.

■
Mr. Gordon: We offer the further testimony of Mr. Walker on p. 120 of the printed record.

Questioned by Mr. Gordon:

Q. Who had these deeds recorded in 1889? A. My father.

Q. Your father? A. Yes, sir.

Q. Did he come down here to look after this land? A. He was down through Texas.

Q. You don't mean to say that he did not pay any taxes on the land, do you? A. I don't think he did.

Q. You don't know of your own knowledge whether he did or not? A. No, sir.

Q. What effort was made during the time of your connection with this matter towards locating this land and ascertaining the condition of it with reference to the claim of ownership? A. I have written to several people.

Q. I will change the form of the question. I will ask you whether or not there has been any effort made with reference to establishing the title and claim of ownership to it?

A. I have written to several men to try and locate where the land was, and what chances there were for me to recover it.

Q. How long a period of time did your different inquiries cover? A. My father started in 1877, and my grandfather started in 1860. He inquired about it in 1860, and I see letters from my father written in the seventies, and I have inquired about it in the last three or four years, and have asked several different ones to locate it.

Q. You say that beginning in the sixties your grandfather did make inquiries of men down here about the title to the land? A. He made some inquiries of men down here, it is just old letters I have found is all.

Q. Have you any of those letters with you? A. I don't know whether I have or not.

Q. Will you kindly make a search for those letters after you leave the witness stand? A. Yes, sir; I suppose I could.

Mr. Gordon: I request you to do so.

Also re-direct examination of Mr. Walker by Mr. Gordon on p. 121 read:

Questioned by Mr. Gordon:

Q. I will ask you whether or not your father and your grandfather asserted claim of ownership to the land during their lifetime?

Judge Kennerly objects to the first question because it calls for the conclusion of the witness.

The Court: He does not answer the question.

(Objection withdrawn.)

Q. Did your father and grandfather ever say anything about this land, and if so, what did they say concerning the claim of ownership to it?

The Witness: I know this: When I was a small boy I have heard my grandfather say that he owned land in Texas, and I have heard my father say we owned it is all.

Mr. Gordon: I will offer the latter part of the examination on p. 122 answering the questions of Mr. Hightower:

Q. Did you ever hear your father or grandfather say that he ever rendered the land for taxes? A. Yes, sir; he said he could not locate it.

Q. You had all these deeds? A. Yes, sir; and I have tried to locate it.

Mr. Gordon offers on the question of forgery the testimony of A. L. MAYES, Clerk of the County Court of Jasper County, as set out on p. 132 of the printed record.

Questioned by Mr. Gordon:

Q. You are the County Clerk of Jasper County, Texas?

A. Yes, sir.

Q. How long have you held that position? A. Four years.

Q. Are you the custodian of papers in estates and administrations? A. Yes, sir.

Q. Have you any papers in the estate of Frances Bevil with you? A. Yes, sir.

Q. Would you let me have them? A. Yes, sir. (Witness produces papers).

Q. Did these papers numbered from 1 to 3 come from your custody as custodian of that estate? A. Yes, sir; they did.

Q. Are you willing to leave these papers in the custody of the clerk of this court to be returned to you by the clerk of this court at the conclusion of this trial? A. Yes, sir.

Mr. Gordon: I offer in evidence in this connection original papers numbered 1, 2 and 3, filed in this court December 4, 1912, and identified on p. 132 of the printed record.

(There papers offered for comparison of signatures have been ordered sent up to Appellate Court for its inspection.)

Judge Kennerly: What is the purpose of the offer?

• *Mr. Gordon:* To show that that is the genuine signature of John Bevil to that deed.

Judge Kennerly: We object for the reason that under the law papers or documents pertaining to matters wholly outside of the case cannot be offered in the case for the purpose of forming a basis for comparison of handwriting.

The Court: I think the statute passed in 1912 on this subject abrogates the rule that once prevailed. He offers this

as a standard of comparison so the jury can determine whether the signature to the original instrument is the signature of this man.

Judge Kennerly: I make the further objection that there is no proof that the signature of John Bevil on these papers is the genuine signature of John Bevil. I make that in addition to the other objections.

Objections overruled.

Defendants except.

The Court: Between now and the convening of the court in the morning, I wish you would get a copy of the statute changing the rule on this subject.

(The court afterwards gets the statute.)

The Court: This leaves the objection that the documents offered which it will be contended bear the signature of Bevil have not been proven to bear the genuine signatures of John Bevil. I will overrule the objections on the assumption that they will make the proof:

Mr. Gordon: We offer the testimony of J. R. BEVIL, beginning on p. 125 of the record:

Questioned by Mr. Gordon:

Q. How old are you, Mr. Bevil? A. I am 58.

Q. Of what place are you a native? A. I am a native of near Woodville, Tyler County, Texas.

Q. I will ask you whether or not you have lived in this section of the country all your life? A. Yes, sir; in Tyler and Hardin Counties all my life.

Q. What was your father's name? A. Warren Bevil.

Q. What was your grandfather's name? A. John Bevil.

Q. Where did John Bevil live? A. Well, he lived in Jasper County until about 20 years before he died, and for about 20 years before he died he lived in Jasper County most of the time with my father; some of the time he lived in Jefferson County.

Q. How old was he when he died? A. 74.

Q. When did he die? A. In 1863

Q. At your father's house? A. Yes, sir.

Q. Were you there? A. Yes, sir.

Q. I will ask you whether or not from having seen your grandfather write or from seeing writing known to be his, you are acquainted with his signature?

The Witness: I have seen his letters often when I was young, but I would not remember his signature from his letters, but afterwards in examining many papers that he had signed——

The Court: You have stated that you saw his handwriting and signature when a boy, and do not know that you could remember his signature from that, but you afterwards examined his writing and signature?

The Witness: Yes, sir; I have seen his writing when I was young, but I could not remember his signature from seeing his writing at that time, but afterwards in examining papers when he was administrator of the estate of Frances Bevil, his wife, and seeing his signature written many times during that administration, and when he was clerk, I know his signature.

Q. You know from that? A. Yes, sir; I know from that it was his signature. I would know his handwriting if I should see it.

Q. I exhibit to you an original deed purporting to have

been executed by Charles A. Felder in 1839, to John A. Veatch, and purporting to have been witnessed by two witnesses, and purporting to have been acknowledged on the 18th of June, 1839, before John Bevil, as Chief Justice of Jasper County, Texas, and ask you to examine the signature of John Bevil to this deed?

Mr. Lee: We object because we do not think the witness has been sufficiently qualified. In the first place, he testified that he was not able to identify his signature from having seen him write, and in the second place, the writing he is testifying about having seen is not shown to have been the signature of his grandfather.

Objections overruled.

Defendants except.

Q. I ask you to examine the signature? A. Yes, sir; that is my grandfather's signature.

Q. That is your grandfather's signature? A. Yes, sir. That is his signature to this instrument.

Q. When did your father die, Mr. Bevil? A. In 1865.

(The original deed is ordered sent up for the inspection of the Appellate Court.)

Mr. Gordon: We read the cross examination also, beginning on p. 128:

Q. You say you are sure that is your grandfather's signature? A. Yes, sir.

Q. Now, I will ask you if you remember the signature from the numbers of signatures you testify to having examined in the papers as administrator? A. Well, there are many particulars in which they show alike. For instance that J

shows very plainly, and the B also shows very plainly, it is almost identical.

Q. Is there any other resemblance besides the B and J?

A. Yes, sir; a great many, the B shows like he made them all the time.

Q. How old a man was your grandfather at the time he was the administrator of his wife's estate? A. He was administrator in 1858 or 1859 is my recollection and on down until 60 and maybe later, I don't know just when he was discharged.

Q. What year did he die? A. In 1863.

Q. He was 74 when he died? A. Yes, sir.

Q. Those signatures were written in the latter part of his life, were they not? A. Yes, sir.

Q. You mean to say that the signature you have here is almost identical with the signature he wrote in the latter part of his life that you saw on those papers? A. Yes, sir; it resembles it in many respects.

Q. This signature bears date in 1839, and the signatures you saw bear date along before 1863, shortly before? A. Yes, sir.

Q. Along about that time? A. Yes, sir.

Q. Some 20 years later and at that time he was a pretty old man? A. Yes, sir.

Q. He was pretty old at that time? A. Yes, sir.

Q. Was the signature you saw on these old papers almost identical with the signature you have here? A. It might not have been as regular as that, might have been a little nervous, but the letters were the same; it is the same handwriting.

Q. What are some of the other characteristics you are identifying the signature by besides the J and B? A. Well,

there are many characteristics there, I don't know that I could tell all about them.

Q. Tell what some of them are besides the J and B? A. Well, of course that i appears to be just such an i as he always made when he signed his name; it might not have been quite as large or a little larger at times; the character shows to be the same, so does the J and v, just like he signed his name.

Q. Based on your knowledge of the papers you examined? A. Yes, sir; the first paper I noticed after I began to take notice, and it then came to my memory that it was the same handwriting as he wrote when he wrote letters.

Q. How many times did you examine the papers in the administration matter? A. Several different times, once two whole weeks.

Q. How long ago did you examine them? A. In 1896 and again in 1900 and again in 1906.

Q. It has been six years since you examined them? A. Yes, sir; but then I have in my possession some of his papers now. I have a paper where Solomon Williams made his application for a league of land before my father when he was Chief Justice, before my grandfather.

Q. You don't say that it is not possible that signature might not have been written by somebody else as a forgery of your grandfather's signature. You would not undertake to say it was impossible that that could have been written by somebody else besides your grandfather? A. Well, he would have had to be expert and ahead of the times.

Q. You would not say it could not have been made by somebody else but your grandfather? A. I think it would have been about impossible.

Q. You cannot say it would have been absolutely im-

possible, you would not undertake to swear absolutely that it was not written by somebody else but your grandfather? A. Yes, sir; I would think it would be impossible for anybody to copy his signature exactly like that is.

Q. Would you swear it would be impossible for anybody to do that? A. Yes, sir; I would swear that I don't think it would be possible. If they took it and practiced it for two or three months, it might be possible to make that signature similar to that. It could be possible; I don't think it would be probable at all.

Q. You don't claim to be an expert in handwriting? A. No, sir.

Q. You don't claim that at all? A. No, sir.

Q. Your only reason for saying this signature here is the signature of your grandfather is based simply upon a comparison made by you with some other papers that you assume your grandfather executed? A. After thinking about it it came to my mind that I had seen my grandfather write just such a handwriting as that was.

Q. I understood you to say in answer to the direct examination of counsel that you could not identify his signature at this time from having seen him write when you were a boy? A. Well, I don't know that I would have known it if I had not seen it since I was 18 years of age, but from the facts surrounding the other writing, it comes to my mind now that I had seen him write such a hand. That refreshes my mind as to the matter.

Q. The court has overruled counsel on the question that you are not qualified to speak on the matter, and we are now trying to find in what attitude you are in reference to being competent to pass on the matter. I understood you to say that

from having seen your grandfather write you could not identify his signature, and there were certain old papers that you have examined and seen on numbers of occasions, and that you did not see him sign those papers, but know from the character of the papers and the place you found them, you know they were the signatures of your grandfather and being acquainted with them, you think this is the signature of your grandfather? A. Yes, sir, and from my memory of seeing his handwriting when he wrote letters. Even when I was 18 years old, if some one had brought me something and said was that my grandfather's handwriting, but after seeing those documents, I know it is his handwriting.

Q. That is after seeing the papers you refer to? A. Yes, sir.

Q. Outside of that you would not undertake to swear to this paper? A. No, sir, if I had not seen anything up to the present time I would not.

Q. It is just like you stated to counsel in the beginning; had it not been for these papers that you say your grandfather executed, although you did not see him execute them, had it not been for these papers, you would not undertake to say that was his genuine signature; you did not see him sign the papers? A. No, sir.

Q. From your knowledge of seeing him write when a boy, you could not swear to this signature from that? A. No, sir, if I had not seen something I knew he wrote.

Q. Could you identify this signature from your knowledge of your grandfather's signature acquired by having actually seen him write, leaving out all the others, all the other papers, would you be willing to swear that this is your grandfather's genuine signature by reason of your knowledge of

his signature from having actually seen him in the act of writing? A. I don't know that I could.

Q. You have already testified about the papers? A. Yes, sir.

Q. You make the comparison by the other papers? A. Yes, sir.

Judge Kennerly: We renew the objections and move to strike out the testimony for the reasons given, and for the additional reason that the witness would not be permitted to testify to the signature based on his examination of other signatures unless such other signatures are produced before the court, and it is a question for the jury to pass on whether or not those are the signatures of John Bevil.

The Court: He has offered and exhibited these papers to the jury.

Judge Kennerly: The witness has testified to the signature of John Bevil.

The Court: Yes, sir, based on two facts—he has seen him write, and with that the statement that he would not be able to swear to his writing from that fact alone, but by the further fact that from an examination of the papers and having familiarized himself in that way, he is prepared to say that is the signature of his grandfather.

Judge Kennerly: His testimony indicates that he has examined other papers not produced before the court from which he testifies to the signature.

Objections overruled.

Defendants except.

Mr. Lee: We object further to the witness testifying to the papers he examined in court, for the reason that it has not

been proven in this case that the papers exhibited to the jury were the papers bearing the signature of John Bevil.

The Court: They were admitted because of the fact that they purported to bear the signature of John Bevil, and are of such ancient date and come from such source that the court considered them circumstances that the jury was entitled to have to assist them in solving the issue as to whether the deed from Felder to Veatch was a forgery or had on it the genuine signature of the grantor.

Objections overruled.

Defendants except.

Mr. Gordon offers in evidence, on the issue of forgery, the testimony of Henry Ralph, p. 133 of the printed record.

Mr. Lee: We object to this testimony for the reason that one of the issues is whether or not the deed from Felder to Veatch was a forgery, and that testimony as to the character of John A. Veatch on the issue of forgery would be irrelevant, immaterial and incompetent, and not the proper way or method by which forgery or the validity of a deed could properly be shown, and for the further reason that the time at which the witness testifies that he knew Veatch and his general reputation was too remote from the date of the purported execution of the deed.

The Court: The signature which is in issue here is alleged to have been made in 1839, and that signature now in 1912 is assailed by an affidavit alleging that the signature to the deed alleged to have been made in 1839 was a forgery. At this late date the court is of the opinion that considerable latitude should be permitted the parties where an issue of this kind is sought to be solved in introducing testimony bearing

on the question of whether the signature is genuine or not. The witness states further along how well he was acquainted with Veatch, and how he became acquainted with him, and his general reputation in the community. I think the general reputation of the grantee on a question of forgery becomes admissible to enable the jury to determine whether he would be a party to a forgery. The facts show that Veatch lived here many years ago. I think it presents a case where it is the best evidence of which the case is susceptible, and on that ground I overrule the objection and admit the testimony.

Defendants except.

HENRY RALPH, a witness for the plaintiffs, testified as follows:

Questioned by Mr. Gordon:

Q. Your name is Henry Ralph? A. Yes, sir.

Q. How old are you? A. Nearly 75.

Q. Where do you live? A. In Jasper County.

Q. How long have you lived in Jasper County? A. Very near 75 years; I was born there.

Q. What portion of the County? A. The north-western.

Q. Did you ever know a man who lived in that portion of the country named John A. Veatch? A. I did.

Q. How old were you when you first knew him? A. I don't remember about that I knew him until I was about 10 or 11 years of age when he left that country.

Q. How far did you live from where Dr. Veatch lived? A. About three and a half or four miles.

Q. Were you acquainted with his family? A. Yes, sir, I went to school with two boys and two girls.

Q. Are you acquainted with the general reputation for integrity of Dr. Veatch in that community? A. Yes, sir.

Q. Please state to the jury what it was, good or bad?

The Court: About what time do you speak of knowing his reputation?

The Witness: I speak of from the time I was old enough to take notice of any such thing and for years afterwards.

The Court: That means sixty odd years ago?

The Witness: Yes, sir.

Q. I will ask you whether or not you ever heard anything said by the neighbors of Dr. Veatch derogatory to his character as an honest and upright man? A. No, sir, I never did.

Q. What public positions have you held in Jasper County? A. I have been Justice of the Peace and Commissioner of the County, and I once represented the District in the Legislature.

Q. You have lived there all your life? A. Yes, sir.

Q. Did you live in the same neighborhood that Dr. Veatch and his family lived when they lived there? A. Yes, sir, in the same neighborhood.

Q. Do you know whether or not Dr. Veatch held any position of honor or trust in the service of his country in the Mexican War? A. He was Captain of a Company he raised in that section of the country, in Jasper, Sabine, and Tyler Counties.

Q. Was he a married man and had a family? A. Yes, sir, he was a married man and had a family.

Q. What was his profession? A. He was a surveyor and I think a mineralogist.

Q. Do you know whether he was physician? A. Yes, sir, he was a physician, also.

Cross Examination on p. 135 read by Mr. Lee:

On cross examination the witness, Henry Ralph, testified as follows:

Questioned by Mr. Butler:

Q. How old were you in 1839? A. I was a year old.

Q. Two years old? A. No, sir, I was a year old. I was born in January, 1838.

Q. When is the first time you have an independent recollection of Dr. Veatch as a man. A. My recollection don't go back farther than 1847 or 1848, about 46 I guess; I was going to school along about that time with Dr. Veatch's children, 1847 or along there.

Q. How old a man was Dr. Veatch when you first remember him? A. According to my recollection he looked to be a man about 40.

Q. In 1846? A. Yes, sir, 35 or 40, I don't remember distinctly as to that though.

Q. Were you acquainted with his family? A. Yes, sir, with his children.

Q. Do you remember his wife? A. No, sir, she was dead before I have any recollection.

Q. Did he marry after that? A. I heard he did, but I don't know that personally.

Q. How long was it after you first knew Dr. Veatch until he left Jasper County, if he ever left there? A. I think he left there in 1848 or 1849.

Q. In 1848 or 1849? A. Yes, sir.

Q. You were 11 years old in 1849? A. Yes, sir.

Q. Had Dr. Veatch ever lived in Jasper County since 1849? A. Not that I know of.

Q. All you know about Dr. Veatch was acquired up to the time you were 11 years old? A. Yes, sir, personally.

Q. How many times did you ever hear his reputation discussed? A. I could not answer that question independently.

Q. How is that? A. I could not answer the question because I don't remember.

Q. Do you remember ever having heard his reputation discussed at all? A. Yes, sir, often.

Q. About how many times? A. I could not say as to the number of times at all.

Q. Can you give some idea about how many times, whether many or few? A. Quite a number of times, but as to the exact number I could not say.

Q. What did Dr. Veatch do for a living? A. I think he was a practicing physician for a time and followed surveying for quite a while.

Q. How far did you live from him? A. Three miles and a half or four miles.

Q. Was he the only physician in that neighborhood? A. No, sir, Dr. Work was a physician there.

Q. Was Dr. Veatch during the time you knew him a man of limited means or a wealthy man? A. I don't think he was a wealthy man.

Q. He was a man of limited means then? A. Yes, sir, I think so.

Q. What kind of style did he live in, how big a house did he have? A. Just a common country house.

Q. Was it a log house? A. I think it was a house built of lumber.

Q. Did he farm any? A. I don't think he did.

Q. How big a place did he have where he lived? A. I

don't remember about that; it looked like a small place, four or five acres.

Q. Do you know whether or not he owned the place he lived on? A. Yes, sir, I think so.

Q. It was just a small farm? A. Yes, sir.

Q. How many children did he have? A. Six, I think.

Q. Was Dr. Veatch accounted at that time a man any wealthier than anybody else that lived around in that neighborhood? A. He might have been to a small extent, but not much so, I suppose. There were saw mills in that country at that time, and the owners of the mills might have been worth as much as Dr. Veatch.

Q. Did he have a large or small practice in that community? A. I don't know.

Q. He was just a country doctor living on a small farm in Jasper County? A. Yes, sir, as far as that goes.

Q. During the time you knew him was he continuously living there up to the time he left Jasper County in 1849? A. No, sir, think not.

Q. Where did he live other than there? A. He was in different portions of the country in some of the surrounding counties. I think he might have lived in Tyler County, I am not sure, but I think he did, and then he was in the Mexican War, but I don't know how long. I know he raised a company and went to the Mexican War.

Q. Was that in 1849? A. Yes, sir, '48 or '49, he was in the army before he raised a company according to my understanding.

Q. He never lived in Jasper County or this part of the State after 1849? A. No, sir, not to my knowledge.

Q. How many men did you ever know by the name of Dr. Veatch? A. Only one.

Q. Only one Dr. Veatch? A. Yes, sir.

Q. How many men did you ever know by the name of Dr. Veatch? A. Only one as I have stated.

Q. How many men did you ever know by the name of John A. Veatch? A. I suppose two—that is, one of his sons and himself.

Q. He had a son by the name of John A. Veatch? A. Yes, sir.

Q. How old was that son when you knew him? A. I suppose he was 15 or 16 years old.

Q. When you first knew him? A. Yes, sir, somewhere about that.

Q. How old was that son in 1849 approximately? A. I suppose he was 18 or 19 years of age.

Q. In 1849? A. Yes, sir.

Q. You say that you never knew anybody else of that name but Dr. Veatch and his son? A. Yes, sir, that is all.

Q. Do you know whether Dr. Veatch was in debt when he lived in Jasper County? A. I do not.

Q. Do you know what his reputation was for paying his debts? A. No, sir, I do not.

Q. You never heard it discussed? A. No, sir.

Q. Do you know whether Dr. Veatch ever practiced medicine anywhere else besides in Jasper County? A. Yes, sir, that is my impression occasionally, I don't think he made a regular business of the practice of medicine; I don't think he did at that time, but he did practice.

Q. His regular business was farming? A. No, sir, I don't think it was, I don't think he had sufficient ground to consider him as a regular farmer, that is, open land.

Q. Do you remember his personal appearance? A. Yes, sir.

Q. What kind of looking man was he? A. A very fine looking man.

Q. Tall or short? A. He was a tall fine looking man.

Q. You don't remember his wife at all? A. No, sir.

Q. You don't know what nationality she was? A. No, sir, I don't.

Q. When was the last time you remember seeing any of the children of Dr. Veatch? A. About 1849.

Q. Did the children leave Jasper County with him? A. Yes, sir, they left there in 1849.

Mr. Gordon: We offer the balance of it.

Mr. Lee objects to the last question and answer on p. 138 of the cross examination. The question is "You don't know of your own personal knowledge where he went when he left Jasper County?" The answer is not responsive to the question, and objected to for this reason.

Objection sustained.

Plaintiffs and interveners except. Question and answer are as follows:

Q. You don't know of your own personal knowledge where he went when he left Jasper County? A. The children went to San Antonio is my information. I learned later that they went to California, I don't know it personally though.

Mr. Lee objects to the question which appears partly at the bottom of p. 138 and partly at the top of p. 139, and the

answer thereto, and the statement of counsel shown on p. 139, as immaterial, irrelevant and incompetent and the opinion of the witness.

The Court: I think it is a question that the jury will have to find and I sustain the objection.

Plaintiffs and interveners except. Question and answer are as follows:

Questioned by Mr. Gordon:

Q. I will ask you whether or not, in your opinion, based on your personal knowledge of Dr. Veatch, and upon his reputation for honesty and fair dealing in the community in which he lived, whether or not, in your opinion he was such a man as would commit the crime of forgery or take the benefits knowingly of a forged deed?

Q. I will ask you this question now: Compared to his other neighbors and the citizenship generally in Jasper County at that time whether Dr. Veatch was a man of medium circumstances, or was he in a condition of poverty? A. He was in medium circumstances.

Q. I will ask you whether or not he was a man reputed to be a large land owner? A. I don't think at that time he was.

Q. You don't know how much land he owned or anything about it? A. No, sir, I don't know how much he owned.

Mr. Whitaker: We offer now the testimony of T. B. Beaty from the printed record. The witness testified in August, 1912, or rather he testified in December, 1912, and I believe said he would be 72 or was 72 in August, 1912:

T. B. BEATY, a witness for plaintiff, testified as follows:

Questioned by Mr. Gordon:

Q. How old are you, Mr. Beaty? A. 72 the 10th of last August.

Q. Where do you live? A. In Tyler County.

Q. How long have you lived in that section of the country? A. 72 years.

Q. You were born there? A. Yes, sir, I was born in the town of Jasper.

Q. How long did you live in Jasper County? A. Well, it is pretty hard to tell; I have it sorter mixed; my father left there when I was about ten years old. I have lived in Tyler and Jasper all my life except two years; my father lived a while in San Jacinto County a while and the balance of the time I have lived in Sabine and Tyler.

Q. How far from the place where you were born have you lived most of the time and live now? A. About 32 miles.

Q. You have lived there all the time? A. Yes, sir; except two years in Liberty or San Jacinto when I was 10 or 11 years old.

Q. Are you related to J. T. Beaty who used to be State Senator from this District? A. Yes, sir; he is a nephew of mine.

Q. Do you remember Dr. John A. Veatch, who lived in the northwest part of Jasper County? A. I just can remember him; it is so far back, I just can remember the man is all.

Q. I will ask you whether or not you are acquainted with the general reputation in the community in which he lived of Dr. Veatch for honesty and uprightness and fair

dealing, covering all years from your acquaintance with down to the present time? A. I will have to take that by hearsay, because I was too young to remember anything of that kind.

Q. That is what I want to know; are you acquainted with what people generally say about him? A. Yes, sir.

Q. What was that, was it good or bad?

The Court: What time do you speak of that you say you were acquainted with his general reputation from hearsay?

The Witness: From my first remembrance of Dr. Veatch.

Q. What time was that, about how long ago? A. I was born in 1840; that would be in '45 or '46, somewhere along there.

Mr. Lee: We object to the first question on p. 141, because the witness has shown by his testimony that he was too young to have been familiar with such reputation, and for the further reason has not properly qualified to answer the question. They do not ask what the general reputation of the party was in that community.

Objections overruled.

Defendants except. Question and answer are as follows:

Q. Now, what was that reputation among his neighbors, people of that section, good or bad? A. As far as I know, it was good.

Mr. Lee: Defendants object to the second* question on p. 141 because they are attempting to show the reputation of Dr. Veatch by testimony as to what certain persons thought of him; in other words, by showing specific instances of

what others thought of him, and not the general reputation. We object for the further reason that you can not prove character and reputation for honesty and uprightness by negative testimony.

Objections overruled.

Defendants except. Question and answer are as follows:

Q. Did you ever during all the years of your living in that country hear anyone speak in a derogatory manner of his honesty and uprightness? A. No, sir; I never did.

Mr. Whitaker: We offer the same testimony by this witness as offered by the witness Ralph, *i. e.*

Mr. Gordon: I want to ask this witness the same question I did the other witness, as to whether, based on his knowledge of him, etc., he would believe he was such a person as would commit the crime of forgery, or accept the benefits of it.

Same ruling and exception reserved by the plaintiffs and interveners. Question not answered.

On cross examination the witness, T. B. Beaty, testified as follows:

Questioned by Mr. Butler:

Q. What year were you born? A. In 1840.

Q. What part of the year were you born in? A. August 10.

Q. You were six years old in 1846? A. Yes, sir.

Q. You said awhile ago that your recollection of Dr. Veatch was so dim and vague that it amounted to practically nothing, your personal recollection of him? A. I just can remember the man and that is about all.

Q. Do you remember anything about his personal appearance? A. No, sir.

Q. You remember there was such a man? A. Yes, sir; and then he was very intimate with my father's family, and I have heard the family speak of him often.

Q. Personally, all you know about him is based on what you have heard talked? A. Yes, sir; what I have heard of the character of the man.

Q. When did Dr. Veatch leave Jasper County? A. I can not tell you.

Q. You were too young to remember distinctly? A. I don't know that I was too young, but don't remember when he left.

Q. How near did you live to him? A. I don't remember just where he lived; he was there about the town of Jasper or somewhere in that country; I don't know where he lived.

Q. You don't even know where he lived? A. No, sir; I don't.

Q. You were nine years old in 1849? A. Yes, sir.

Q. How many times did you ever hear Dr. Veatch's reputation discussed? A. I could not tell you that, probably a dozen times I heard his reputation discussed; I could not say how many times.

Q. What do you understand by a man's reputation? A. I understand a man's reputation where he is spoken of by his neighbors, his general reputation.

Q. All the times you heard Dr. Veatch spoken of was after he left there? A. I cannot tell you about that. He might have been there and might have left, I don't know.

Q. You don't know whether you heard his reputation discussed before or after he left there or when it was? A. No, sir; I can not remember that.

Q. You said you did not even know where Dr. Veatch lived? A. No, sir.

Q. You have no recollection of being at his house? A. No, sir.

Q. Do you remember any of his family? A. No, sir.

Q. You don't remember his wife or boys? A. No, sir.

Q. Did you ever have a place pointed out to you as being Dr. Veatch's place? A. I just can remember the man and that is all, and then what I have heard my family say about him and that is all.

Q. Yet you come here and testify that his reputation for honesty was good when you can barely recollect that there was such a man? A. I testified that his honesty was all right as far as I knew. I never heard anything against it.

Q. You don't know much about it? A. That is my misfortune.

Q. And not your fault? A. No, sir; I don't suppose it is.

Mr. Lee: Because of the testimony of the witness that "I just can remember the man and that is all" and then "I have heard my family speak of him and that is all" it develops that the witness does not state his general reputation, but testifies what his own family thought of Dr. Veatch, we object because the testimony is incompetent and inadmissible on general reputation, and the defendants therefore move the court to strike out all the testimony as to the general reputation and character of Dr. Veatch.

Motion denied and overruled.

Defendants except.

Mr. Whitaker offers in evidence the deposition of MRS. NELLIE R. LOWE:

Q. State your name, age and place of your birth. A. Mrs. Nellie R. Lowe, I am 86 years old. Born in Hempstead County, Arkansas, on the 4th day of August, 1826.

Q. Did you leave Arkansas and come to Texas? A. I left Arkansas and came to Claiborn Parish, La., when quite a child. I lived there three years and then came to Texas in 1835.

Q. Where did you move to in Texas? A. I moved to Sabine County, Texas, in 1835.

Q. How long did you live in Sabine County, Texas? A. I lived in Sabine County, Texas from 1835 until about 1876, when I went to Hill County, Texas, and lived there until about ten years ago when I came back to Sabine County and have not been out of the county since then.

Q. Who was your father? A. William W. Boren.

Q. State whether or not you ever were married and if so to whom and when and where did you marry? A. Yes. I married Perry Lowe at Brookland in 1845. The place was not known then as Brookland, but this was the place. My father moved here and built a mill here.

Q. Did you ever know John A. Veatch? A. Yes, sir.

Q. When did you know him and how long did you know him? A. I can't tell exactly the dates. I knew him in Sabine County, near Sabinetown. He lived there a while --two or three years and moved back to Jasper.

Q. About how old were you when you knew him first?

A. About twelve years old.

Q. Did you know the family of Mr. J. A. Veatch? A.

Yes, sir. I was well acquainted with his family. Have been to his house often.

Mr. Lee objects to the last question at the bottom of p. 2, for the reason that the question is improper because she is not asked whether she knows his general reputation.

The Court: Technically, you are correct in this particular instance, but the balance of the testimony shows. I will overrule the objection.

Defendants except. Question and answer are as follows:

Q. Were you acquainted with the reputation of John A. Veatch, in the neighborhood where he lived, as to his honesty and fair dealings? A. Yes, sir; he was counted a perfect gentleman in that respect.

Mr. Lee: We object to the first question on p. 3 for the same reason, the proper question is not asked; she is asked if she knows the reputation and not the general reputation.

Objection overruled.

Defendants except. Question and answer are as follows:

Q. What was that reputation? A. He was counted a perfect gentleman in that respect. I never knew anything wrong alleged against him in his life. There was nothing wrong about him. He always bore a good reputation always.

Q. What became of John A. Veatch, and if he left here state when, etc. A. He left here (Sabine County) in 1846, and went to Mexico. At that time he had moved back from Jasper County. He left Jasper County after his wife died. She died at Town Bluff in Jasper County.

Q. You say your father had dealings with him. What were those dealings? A. Why, it was some land dealings. I couldn't state exactly what it was. I was a child. My father, William Boren, built a house for J. A. Veatch at Sabinetown. The first time I ever saw him I was about twelve years old. We lived about a mile from Sabinetown. Father had already built the house and he (Veatch) came to father's house to get the keys to open his (Veatch's) house. He invited us over to see his family. He had a large library and Mrs. Veatch offered us the books to read, and I read lots of the books from his library.

Q. Now, Mrs. Lowe, please state at what different places you have lived in Texas, and give the dates as near as you can; and if you have not stated it exactly correct as to the places you have lived in your answers already given make the correction here and give each place as near as you can. A. I came to Sabine in 1835, and father settled on the Pologoch Creek, Sabine County, and lived there about three years, I think, I was a child. We moved from there to Sabinetown where father built a saw mill. My father built a saw mill both at Pologoch Creek and at Sabinetown, the one on the Pologoch Creek being the first saw mill ever built in Texas. We then moved about twenty miles south of Sabinetown. We then moved from that farm to the place that is now Brookland. I married here in 1845, and then moved in a few months, moved to Jasper County, and lived there four or five years, and we then went to Johnson County, and from Johnson County we went to Anderson County, where my husband died in 1858. Then I came back with my five children to San Augustine County and lived with my father, William Boren. I lived there about 17

years and then came down to Sabine County, Brookland, and lived here a couple of years, when in about 1876 my children and I moved to Hill County. We moved from there to Hood County and stayed about two years and then came back to Hill County, and stayed there until about ten years ago, when I again came back to Sabine County and have been living with my relatives in this county since then.

The witness being then examined by the defendants testified as follows, to-wit:

Q. Mrs. Lowe, how old were you when you first knew John A. Veatch? A. About twelve years.

Q. How long did you live near him? A. Two or three years as well as I recollect.

Q. What was he doing during that time? A. I don't know.

Q. Did you ever know Mr. Veatch intimately after that time? A. I frequently saw him.

Q. Do you know what John A. Veatch did at any time when he lived in this country? A. I don't know. He practiced medicine some. He was the first doctor I ever took any medicine from. He was counted a good physician.

Q. Mrs. Lowe, your answers as to the reputation of John A. Veatch are based on what you personally thought of him? A. No. It was based on what everybody thought.

Q. Mrs. Lowe, did you ever hear his reputation discussed? A. Yes, many a time. He was spoken of as being honest.

Q. What made the people discuss his reputation, Mrs. Lowe? A. I don't know. They just spoke of him being a good man.

Q. Did he practice medicine at Sabinetown when you knew him there? A. Yes, and he practiced in Jasper, too, until he went to the war.

Q. Was Mr. Veatch a poor man like the rest of the people here, or was he rich? A. Yes. He was a poor man, but owned a good deal of land.

Q. Mrs. Lowe, do you know about what land was worth in this country in 1838 and 1839 and along there? A. Yes. It very often sold at fifty cents an acre.

Q. Mrs. Lowe, during those years land was worth practically nothing and very often sold at even 25 cents an acre? A. Yes. The unimproved land very often sold for 25 cents an acre.

Q. Mrs. Lowe, did Mr. Veatch have enough money to pay \$5,000.00 or \$6,000.00 or \$8,000.00 in cash for lands?

A. I can't tell you. I don't know.

Q. Mrs. Lowe, was Dr. Veatch a surveyor? A. I can't say that he was.

Q. Was the business that he followed for a living that of practicing medicine? A. Partly.

Q. And what other business did he follow? A. He had land that he sold some times.

Q. Do you know who Mr. Veatch married—who his wife was before she married? A. She was Miss Charlotte A. Edwards.

Q. Mrs. Lowe, do you know anything about Mr. Veatch's dealings with other parties with reference to lands?

A. No, sir.

Q. Do you know how he got the lands that he owned?

A. No, sir.

Mr. Lee: We object to the question at the bottom of p. 6 and the top of p. 7.

Objection sustained.

Plaintiffs and interveners except. Question and answer are as follows:

Q. Mrs. Lowe, have you ever heard Mr. Veatch spoken of as a land grabber or land shark? A. No.

Q. Mrs. Lowe, do you know where Mr. Veatch married? A. He married in Louisiana the first time.

Q. When he left here did he take his family with him, Mrs. Lowe, or did he have any family? A. When he left here he put his children in a convent in San Antonio. He married again at San Antonio and his wife wouldn't go with him to California, or keep the children, and he then put them in the convent. He later sent and got his children.

Q. Mrs. Lowe, do you know whether Dr. Veatch wound up all his business here before he left? A. No, sir. I don't.

Q. Did you live in the same neighborhood where Dr. Veatch lived in 1839? A. I don't know. I don't think he could have gone there prior to 1840.

Q. Then when Veatch moved in that house that father built that was the first time that you ever knew him? A. Yes, sir. My father knew him before that, but that is the first time we lived in the neighborhood where Dr. Veatch lived.

Mr. Whitaker: We offer from the printed record p. 148, the deposition of David Rafferty, taken November 8, 1912:

The witness DAVID RAFFERTY testified by deposition for plaintiff as follows, said deposition being taken at Portland, Oregon, on November 8, 1912:

First Interrogatory:

Please state your name, age and place of residence and how long you have resided there. Please state what business you are engaged in and how long you have been so engaged.

Answer:

My name is Dave Rafferty. I am 68 years of age and reside in the City of Portland, County of Multnomah, State of Oregon, which has been my place of residence now for the past forty-four years. For the past 31 years I have been engaged in the practice of medicine and surgery in and about the City of Portland. During a part of this time I was also engaged in the drug business with my brother R. M. Raffety, under the firm name and style of Dave Raffety & Bro.

Second Interrogatory:

Please state what business you were engaged in during the 50's and the 60's and where you were living at that time.

Answer:

During the 50's I lived on a farm in Washington County, Oregon, and attended school. During the 60's I entered Pacific University at Forest Grove, Oregon, and was graduated therefrom in 1867.

Third Interrogatory:

Please state whether or not you ever knew John A. Veatch, and if so, state when and where you knew him.

Answer:

I knew John A. Veatch. I first knew him in the City of Salem, County of Marion, State of Oregon, in the winter

of 1868-9, where he was engaged in delivering lectures on the subject of Chemistry to the students of the Medical Department of Willamette University.

Fourth Interrogatory:

If you have stated you knew John A. Veatch, please state what business, profession or calling he was engaged in and where and when was he so engaged.

Answer:

After finishing his lectures in the Medical College at Salem, John A. Veatch came to East Portland. This was in the spring of 1869. He there engaged in the work of assaying and in delivering lectures on geological and scientific subjects. He had his office and laboratory in a room in the rear end of Raffety Bros. drug store.

Fifth Interrogatory:

Please state if the said John A. Veatch is dead and if he is dead, state when and where he died.

Answer:

John A. Veatch is dead. He died April 24, 1870, in a room adjoining his laboratory in the rear end of Raffety Bros. drug store in the City of East Portland, now a part of the City of Portland, County of Multnomah, State of Oregon. The cause of his death was pneumonia.

Sixth Interrogatory:

Please state whether or not, you were intimately acquainted with John A. Veatch, and how intimately and what was the nature of your association with him.

Answer:

I was intimately acquainted with John A. Veatch and saw him and was associated with him almost every day from

the time he came to East Portland until his death. I, from time to time, assisted him with his experiments and in his laboratory work and discussed with him many matters in regard to chemical and scientific subjects.

Seventh Interrogatory:

Were you acquainted with the character and reputation of John A. Veatch as to honesty and integrity in the community in which he lived at the time you knew him. If yea, state what that character and reputation was as to honesty and integrity.

Answer:

I am acquainted with the character and reputation of John A. Veatch as to honesty and integrity in the state of Oregon, at the time I knew him. His character and reputation were good beyond a doubt. He was respected and revered in the City of East Portland as a man of high character and good reputation.

First Cross Interrogatory:

State what different places you have resided in during your lifetime, or the different occupations you have followed, during what years you followed said occupations.

Answer:

I was born in the State of Missouri in the year 1844. I crossed the plains to Oregon in 1852 and resided in Washington County, Oregon until 1868. For the past forty-four years I have resided in the City of Portland, county of Multnomah, State of Oregon. From the year 1852 to 1860 I lived on a farm in Washington County, Oregon and attended school. I entered Pacific University at Forest Grove, Washington County, Oregon, early in the 60's and was graduated therefrom in

1867. I came to Portland in 1868 and studied pharmacy. The spring of 1869, I opened a drug store in the City of East Portland. I was engaged in the drug business until 1880, when I graduated from the Medical Department of the Willamette University and have ever since that time engaged in the practice of medicine and surgery in and about the City of Portland.

Second Cross Interrogatory:

If you have answered that you knew a man by the name of John A. Veatch, and testified that you knew him intimately, please state exactly how intimately you were acquainted with him, and state whether or not you were related to the said Veatch, either by blood or marriage.

Answer:

I was associated with John A. Veatch and saw him almost every day while he lived in East Portland. I am not related to John A. Veatch either by blood or marriage.

Third Cross Interrogatory:

Do you know of your own knowledge anything of the past life of said John A. Veatch before 1850, or is all you know about his life prior to that time based on hearsay knowledge.

Answer:

I do not know of my own knowledge anything of the life of John A. Veatch before the year 1850.

Fourth Cross Interrogatory:

If you answer that John A. Veatch was engaged in some profession, business or calling at the time you knew him, state how long he was so engaged during the time that you knew him, and give the number of years that you were personally

acquainted and intimately associated with the said John A. Veatch. Please answer fully in reference to the facts of your association with him.

Answer:

I first met John A. Veatch in the winter of 1868-9 at the City of Salem, Oregon, where he was engaged in delivering a course of lectures on the subject of chemistry to the students of the medical department of Willamette University. In the spring of 1869 he came to East Portland and was engaged in the business of a chemical, geological and metallurgical expert, having his office and laboratory in the rear of Raffety Bros. Durg Store. I was intimately associated with him and saw him almost every day until his death which occurred on the 24th of April 1870.

Fifth Cross Interrogatory:

If you have purported, in response to the direct interrogatories, to testify as to the honesty and integrity of John A. Veatch in the community in which he lived at the time you knew him, please answer the following:

(a) What do you understand to be meant by a man's reputation?

(b) Where was the said John A. Veatch living at the time you knew him, and what avocation was he engaged in?

(c) How many times did you hear the character or reputation of John A. Veatch discussed, stating the number of times approximately that you heard his character discussed, and the number of times approximately that you heard his reputation discussed, as distinguished from his character.

(d) State the name of each and every person that you heard discuss the character or reputation of said John A. Veatch, and state what the occasion was which called forth a discussion of the character or reputation of said John A. Veatch.

(e) It is a fact, is it not, that you know nothing of the character or the reputation of John A. Veatch prior to 1850? If this is not a fact, state how far back your knowledge of the character or reputation of John A. Veatch extends, and explain minutely how you acquired such knowledge of his character or reputation.

Answer:

(a) I understand the term character to signify what a man really is as evidenced by his acts, and his reputation to be what the community in which he resides says or thinks of him.

(b) At the time I first met John A. Veatch he was living at Salem, Oregon, and engaged in delivering a series of lectures before the medical students of Williamette University, as I have heretofore testified. Afterwards in the spring of 1869 he came to East Portland and engaged in the following of chemical, geological and metallurgical expert.

(c) John A. Veatch was a man of the highest character and of irreproachable reputation. There was, therefore, no reason or reasons for discussing either his character or his reputation, and the same, were seldom, if ever a matter of public discussion, there being no occasion for such discussion. I recall very distinctly, however, of hearing him lauded and praised as a man of strong moral character on numerous occasions, and particularly do I recall two of such occasions.

(d) I recall that I heard ex-Governor W. W. Thayer of Oregon, speak in the highest terms of the character and reputation of John A. Veatch, and likewise do I recall I have heard Hon. C. B. Bellinger, late judge of the Circuit Court of the United States for the district of Oregon, speak in the highest terms of the character, reputation honesty and integrity of John A. Veatch.

The occasion which called forth the discussion of the character and reputation of John A. Veatch by Governor Thayer, Judge Bellinger and others was the sudden and lamentable death of Dr. Veatch.

Mr. Gordon offers in evidence the deposition of C. H. RAFFERTY, taken November 8, 1912, p. 155 of the printed record.

First Interrogatory:

Please state your name, age and place of residence and how long you have resided there. Please state what business you are engaged in and how long you have been so engaged.

Answer:

My name is C. H. Raffety. I am 73 years of age and reside at 494 East Washington Street in the City of Portland, County of Multnomah, State of Oregon, and have resided at said place for 39 years last past. For the past 40 years I have engaged in the practice of medicine and surgery.

Second Interrogatory:

Please state what business you were engaged in during the 50's and 60's and where you were living at that time.

Answer:

During the 50's and 60's I was employed in a lumber

mill and on a farm adjoining thereto in Washington County, State of Oregon.

Third Interrogatory:

Please state whether or not you ever knew John A. Veatch, and if so, state when and where you knew him.

Answer:

I knew John A. Veatch. I became acquainted with him in the fall of 1868 at the City of Salem, Oregon.

Fourth Interrogatory:

If you stated you knew John A. Veatch, please state what business, profession or calling he was engaged in and where and when was he so engaged.

Answer:

When I first knew him he was delivering a course of lectures on the subject of chemistry before the Medical Department of Willamette University, at the City of Salem, Oregon. This was in the winter of 1868-9.

Fifth Interrogatory:

Please state if the said John A. Veatch is dead, and if he is dead, state when and where he died.

Answer:

John A. Veatch is dead. His death took place in a room adjoining his office and laboratory in the rear of Raffety Bros. Drug Store in the City of East Portland, Oregon. The cause of his death was pneumonia.

Sixth Interrogatory:

Please state whether or not you were intimately acquainted with John A. Veatch, and how intimately, and what was the nature of your association with him.

Answer:

I was very intimately acquainted with John A. Veatch.⁴ He was the professor under whom I studied a course in chemistry, and as I was particularly interested in this science I was with him a great deal.

Seventh Interrogatory:

Were you acquainted with the character and reputation of John A. Veatch as to honesty and integrity in the community in which he lived at the time you knew him? If yea, state what that character and reputation was as to honesty and integrity.

Answer:

His honesty and integrity were above reproach. I was acquainted with his character and reputation and know them to be good.

First Cross Interrogatory:

State what different places you have resided in during your lifetime, or the different occupations you have followed, during what years you followed said occupations.

Answer:

In my childhood I resided with my parents in the State of Illinois, from there they moved to the Platt Purchase in the State of Missouri and I accompanied them. From there we moved to Atchison County, Missouri, and then crossed the plains to the State of Oregon, this was in the year 1852. I have lived in this state ever since. The early part of my life was devoted to assisting my father on a farm and acquiring an education. When I was 18 years of age I followed the occupation of school teacher. Later I studied medicine and surgery, and have been engaged as a practicing physician and

surgeon for the past 35 years. For the past few years I have been retired.

Second Cross Interrogatory:

If you have answered that you knew a man by the name of John A. Veatch, and testified that you knew him intimately, please state exactly how intimately you were acquainted with him, and state whether or not you were related to the said Veatch, either by blood or marriage.

Answer:

I knew John A. Veatch about as intimately as one man could know another. I am not related to him either by blood or marriage.

Third Cross Interrogatory:

Do you know of your own knowledge anything of the past life of said John A. Veatch before 1850, or is all you know about his life prior to that time based on hearsay knowledge.

Answer:

I know nothing of the life of John A. Veatch prior to 1850.

Fourth Cross Interrogatory:

If you answer that John A. Veatch was engaged in some profession, business or calling at the time you knew him, state how long he was so engaged during the time that you knew him, and give the number of years that you were personally acquainted and intimately associated with the said John A. Veatch. Please answer fully in reference to the facts of your association with him.

Answer:

He was engaged in his profession of a chemical, geological and metallurgical expert during all the time that I knew him,

and that was from the fall of 1868 until his death which occurred on the 24th day of April, 1870.

Fifth Cross Interrogatory:

If you have purported, in response to the direct interrogatories, to testify as to the honesty and integrity of John A. Veatch in the community in which he lived at the time you knew him, please answer the following:

(a) What do you understand to be meant by a man's reputation?

(b) Where was the said John A. Veatch living at the time you knew him, and what avocation was he engaged in?

(c) How many times did you hear the character or reputation of John A. Veatch discussed, stating the number of times approximately that you heard his character discussed, and the number of times approximately that you heard his reputation discussed, as distinguished from his character.

(d) State the name of each and every person that you heard discuss the character or reputation of said John A. Veatch, and state what the occasion was which called forth a discussion of the character or reputation of said John A. Veatch.

(e) It is a fact, is it not, that you know nothing of the character or the reputation of John A. Veatch prior to 1850? If this is not a fact, state how far back your knowledge of the character or reputation of John A. Veatch extends, and explain minutely how you acquired such knowledge of his character or reputation.

Answer:

(a) I understand the term reputation to mean what is thought of a man in the community in which he resides, and

that this term as distinguished from his character which means what he really is.

(b) At the time I knew John A. Veatch he resided for a short time in Salem, Oregon, and the remainder of the time in the City of East Portland, where he was engaged in his work of chemistry, metallurgy and geology.

(c) I do not recall that I ever heard his character discussed. He was a man of the highest character and there was no cause, reason or occasion to call forth a discussion as to his character.

(e) It is a fact that I know nothing of the character or reputation of John A. Veatch prior to the year 1850.

Mr. Gordon offers in evidence the deposition of JAMES D. ADAMS, taken November 27, 1912, pp. 159 and 160 of the printed record:

First Direct Interrogatory:

Please state your name, age and place of residence, and how long you have resided there. Please state what business you are engaged in, and how long you have been so engaged.

Answer:

My name is Joseph D. Adams, I was 78 years old last February. I reside at Maxwell, Colusa County, California, and have resided there for the last thirty years. I am not engaged in any business at present, and have not been engaged in any for three or four years.

Second Direct Interrogatory:

Please state what business you were engaged in during the 50's and 60's and where you were living at that time?

Answer:

I was then in the stock business in Yolo County and in Lake County, California.

Third Direct Interrogatory:

Please state whether or not you ever knew John A. Veatch, and if so, state when and where you knew him?

Answer:

Yes. Along late in the 50's, and early 60's, I knew him in Lake County, California.

Fourth Direct Interrogatory:

If you have stated you knew John A. Veatch, please state what business, profession or calling he was engaged in, and where and when was he so engaged?

Answer:

He, with his son, Andrew, was then engaged in taking out borax from Borax Lake in Lake County, California. That was in the latter 50's and early 60's, he was also a surveyor, and civil engineer, and was in the employ of the Clear Lake and San Francisco Water-Company, which was then operating in Lake County. He was also a physician.

Fifth Direct Interrogatory:

Please state if the said John A. Veatch is dead, and if he is dead, state when and where he died?

Answer:

He is dead; but I do not know when or where he died.

Sixth Direct Interrogatory:

Please state whether or not you were intimately acquainted with John A. Veatch, and how intimately, and what was the nature of your association with him?

Answer:

I knew him intimately, saw him very frequently during the time that I knew him, and at one time traveled with him for two weeks while he was acting as a surveyor or civil engineer for the Clear Lake and San Francisco Water Company in Clear Lake. I was employed to drive him around at the various places he was required to go in the performance of his duties. My acquaintance with him continued for about eleven years.

Eighth Direct Interrogatory:

In this case, a deed of conveyance made to John A. Veatch has been attacked as a forgery. Now, if you have stated that you knew the character and reputation of this man, and had intimate association with him, then state whether or not he was such a man who would either commit forgery himself, or take any benefit from a forgery. Explain fully, and state why you so answer?

Mr. Gordon: There is a portion of the answer to the eighth that we don't believe falls within the court's ruling and I want to offer it separately. I have marked it in brackets.

Answer:

[He was highly respected in that community, by all settlers, in around Lake County, where he was known. His character was above reproach, and his conduct and dealing with the people who knew him in Lake County, at that time, was such as to indicate that he was a man of the highest integrity.]

First Cross Interrogatory:

State what different places you have resided in during

your lifetime, or the different occupations you have followed, during what years you have followed said occupations? *

Answer:

I was born in Missouri. I came to California in the year 1853. I first settled in Cache Creek, which is in Yolo County, bordering on Lake County, California. I lived there eleven years. From there I went to Lake County, California, and was there sixteen years. Up to this time I was engaged in the stock business. I was Deputy Sheriff in Lake County for two terms. One, beginning in the year 1864, and again in the year 1873. I also ran a merchandise store in Lake County in 1871. In 1880, I came to Maxwell, Colusa County, where I now reside, and have resided here ever since. Since I have resided here, I was part of the time in the saloon business, and then ran a livery stable, and had a stock business, and continued in that business until I was out of business several years ago, as above stated.

Second Cross Interrogatory:

If you have answered that you knew a man by the name of John A. Veatch, and testified that you knew him intimately, please state exactly how intimately you were acquainted with him, and state whether or not you were related to said Veatch, either by blood or marriage?

Answer:

I was quite intimate with him, for a period of about 11 or 12 years. During that time, I saw him frequently—a part of that time every day. This was in the town of Lower Lake, Lake County, California. His son, Andrew, married my niece.

Third Cross Interrogatory:

Do you know, of your own knowledge anything of the past life of said John A. Veatch, before 1850, or, is all that you know about his life prior to that time, based on hearsay knowledge?

Answer:

I know nothing of his past life, prior to the year 1850, except what he, himself, told me.

Fourth Cross Interrogatory:

If you answer that John A. Veatch was engaged in some profession, business or calling, at the time you knew him, state how long he was so engaged during the time that you knew him, and give the number of years that you were personally acquainted and intimately associated with said John A. Veatch. Please answer fully in reference to the fact of your association with him.

Answer:

During all the time that I knew John A. Veatch, his calling was that of a surveyor or civil engineer. I knew that he was a physician, also, but I do not remember that he ever practiced at his profession as a physician. During the time that I knew him, which was about 11 years in all, as I have stated, he was either engaged in taking out borax, from Borax Lake, in Lake County, with his son, or was acting as a surveyor and civil engineer, in that County, or was acting as civil engineer for the Clear Lake and San Francisco Water Company. As stated in my direct examination, I at one time drove John A. Veatch around for two weeks, and also saw him quite frequently in Lower Lake, and in that neighborhood.

Fifth Cross Interrogatory:

If you have purported in response to the direct interrogatories to testify as to the honesty and integrity of John A. Veatch, in the community in which he lived at the time you knew him, please answer the following:

(a) What do you understand to be meant by a man's reputation?

Answer:

What people generally say of him.

(b) Where was the said John A. Veatch living at the time you knew him, and what avocation was he engaged in?

Answer:

He was living in Lake County, California, and engaged in the business of surveying and as civil engineer, and was taking out borax from Borax Lake, as before stated.

(c) How many times did you hear the character or reputation of John A. Veatch discussed, stating the number of times, approximately that you heard his character discussed, and the number of times, approximately, that you heard his reputation discussed, as distinguished from his character.

Answer:

I could not state how many times I heard the character or reputation of John A. Veatch discussed. I could not state approximately, the number of times I have heard his character discussed, nor his reputation discussed, as distinguished from his character.

(d) State the name of each and every person that you heard discuss the character or reputation of said John A. Veatch, and state what the occasion was which called forth a

discussion of the character or reputation of said John A. Veatch.

Answer:

I would be unable to state every person whom I have heard discuss his character or reputation. My remembrance of him is that all who spoke of him, spoke of him in the highest terms, and in praise, and I do not remember of hearing anyone ever speak disparagingly of him. I do not recall any particular occasion which called forth any discussion as to his character, or reputation. I do remember that the firm of Herrick & Getz, who kept a general merchandise store at Lower Lake during that time, spoke highly and in praise of him. I have also heard William Kesey, a carpenter in Lower Lake, speak highly of him. Also Thomas Harris, a hotel keeper, at the same place; and Noble Kopsy, a farmer and stockman, living in the same neighborhood, speak highly of John A. Veatch. And numbers of others, but it would be impossible for me to name them all at this time.

(e) It is a fact, is it not, that you knew nothing of the character or the reputation of John A. Veatch, prior to 1850? If this is not a fact, state how far back your knowledge of the character or reputation of John A. Veatch extends, and explain minutely how you acquired such knowledge of his character or reputation?

Answer:

I knew nothing of my own knowledge, of the character or reputation of John A. Veatch, prior to the year 1850.

Mr. Gordon offers in evidence the deposition of O. B. Johnson, taken in November, 1912, p. 165 of the printed record:

Mr. Gordon: We next offer in evidence the deposition of O. B. JOHNSON, taken in November, 1912:

First Direct Interrogatory:

Please state your name, age and place of residence, and how long you have resided there. Please state what business you are engaged in and how long you have been so engaged in and how long you have been so engaged.

Answer:

O. B. Johnson. Age 65 years. Residence Seattle, Washington. Have resided here 30 years. Business, retired from the profession of teaching.

Second Direct Interrogatory:

Please state what business you were engaged in during the 50's and the 60's and where you were living at that time.

Answer:

In the 50's and 60's I was living with my parents at home up to '64, in Vermont. Came to Portland, Oregon, in '69.

Third Direct Interrogatory:

Please state whether or not you ever knew John A. Veatch, and if so, state when and where you knew him.

Answer:

Yes, at East Portland, Oregon.

Fourth Direct Interrogatory:

If you have stated you knew John A. Veatch, please state what business, profession or calling he was engaged in and where and when was he so engaged.

Answer:

He was professor of Chemistry at Willamette Univers-

ity the latter part of '69 and then retired from teaching and took private classes in Chemistry at East Portland.

Fifth Direct Interrogatory:

Please state if the said John A. Veatch is dead and if he is dead, state when and where he died.

Answer:

He died less than a year after the end of '69. Sometime early in the 70's.

Sixth Direct Interrogatory:

Please state whether or not you were intimately acquainted with John A. Veatch, and how intimately, and what was the nature of your association with him.

Answer:

Yes, I may say that I was quite intimate with him, I was associated with him. Being of kindred tastes with the old gentleman, we formed quite an attachment for each other.

Seventh Direct Interrogatory:

Were you acquainted with the character and reputation of John A. Veatch, as to honesty and integrity in the community in which he lived at the time you knew him? If yea, state what that character and reputation was as to honesty and integrity.

Answer:

Yes. His character and reputation as to honesty and integrity, were to my knowledge the highest and best.

First Cross Interrogatory:

State what different places you have resided in during your lifetime, or the different occupations you have followed, during what years you have followed said occupations.

Answer:

Born in Vermont. Served in the Army three years. At school five years. Come to Oregon in '69. Lived in Oregon from '69 to '82. Engaged in engineering for Northern Pacific Railroad three years, during 1870, 1871 and 1872. Began teaching at Forest Grove in 1875. Resided in Salem, Oregon, six years. Professor of Natural History University of Washington 1882; now Professor Emeritus of Zoology University of Washington.

Second Cross Interrogatory:

If you have answered that you knew a man by the name of John A. Veatch, and testified that you knew him intimately, please state exactly how intimately you were acquainted with him, and state whether or not you were related to the said Veatch, either by blood or marriage.

Answer:

We sat together and consulted with reference to the work that he and I were both interested in, namely, Natural History, and Chemistry, and that was all. I was not related to him either by blood or marriage.

Third Cross Interrogatory:

Do you know of your own knowledge anything of the past life of said John A. Veatch before 1850, or is all you know about his life prior to that time based on hearsay knowledge?

Answer:

Prior to the time I became acquainted with him, all that I knew of his previous history was from himself.

Fourth Cross Interrogatory:

If you answer that John A. Veatch was engaged in same

profession, business or calling at the time you knew him, state how long he was so engaged during the time that you knew him, and give the number of years that you were personally acquainted and intimately associated with the said John A. Veatch. Please answer fully in reference to the facts of your association with him.

Answer:

Six to eight months was the length of time that I knew him and during that time he was engaged in this teaching as aforesaid.

Fifth Cross Interrogatory:

If you have purported, in response to the direct interrogatories, to testify as to the honesty and integrity of John A. Veatch in the community in which he lived at the time you knew him, please answer the following:

(a) What do you understand to be meant by a man's reputation?

(b) Where was the said John A. Veatch living at the time you knew him, and what avocation was he engaged in?

(c) How many times did you hear the character or reputation of John A. Veatch discussed, stating the number of times approximately that you heard his reputation discussed, as distinguished from his character.

(d) State the name of each and every person that you heard discuss the character or reputation of said John A. Veatch, and state what the occasion was which called forth a discussion of the character or reputation of said John A. Veatch.

(e) It is a fact, is it not, that you know nothing of the character or the reputation of John A. Veatch prior to 1850?

If this is not a fact, state how far back your knowledge of the character or reputation of John A. Veatch extends, and explain minutely how you acquired such knowledge of his character or reputation.

Answer:

(a) A man's reputation I understand to be the regard by which he is held by his fellow associates and the community in which he lives.

(b) East Portland, Oregon, engaged in teaching chemistry.

(c) Among the large circle of his personal friends it was not uncommon to hear both his character and reputation discussed and he was always considered a model man.

(d) It was so many years ago that I do not feel that I would be able to answer, but I do know that whenever I did hear his reputation or his character discussed, it was always good.

(e) I was not born until 1848.

Mr. Gordon: We next offer in evidence the deposition of the witness, Mrs. ANNIE E. SNOW, who testified as follows:

First Direct Interrogatory:

Please state your name, age, and place of residence.

Answer:

Annie Elizabeth Snow. Age sixty-two. Residence 629 Pine Street, Napa, California.

Second Direct Interrogatory:

Were you ever acquainted with Dr. John A. Veatch; if yes, when did you first become acquainted with him and

where, and state if you were in any way related to him by marriage or otherwise at any time, and if so, how?

Answer:

Yes, I first met him in Lower California about 1868. He was the father of my husband, Andrew Allen Veatch.

Third Direct Interrogatory:

Is Dr. John A. Veatch living or dead? If dead, when and where did he die?

Answer:

Doctor Veatch is dead. He died at Portland, Oregon, about February, 1870. I think.

Fourth Direct Interrogatory:

State whether or not Dr. John A. Veatch ever lived in Texas, where he lived in Texas, when he left Texas, and where he went and where he resided after leaving Texas up to the time of his death.

Answer:

He, Doctor Veatch, lived in Texas. My knowledge as to where he lived in Texas is all hearsay, and I do not remember the exact places. I do not know the exact time he left Texas or where he resided afterwards. When I knew him he resided in San Francisco, California. After that he was Professor of Chemistry at the University of Oregon.

Fifth Direct Interrogatory:

What was Dr. John A. Veatch's profession or calling; state particularly in what business he was engaged during the time you knew him.

Answer:

Doctor Veatch was a scientist and physician. While

I knew him the only definite occupation he had was Professor of Chemistry at the University of Oregon.

Sixth Direct Interrogatory:

State whether he was a learned or an unlearned man and if learned in any special branch, in what particular branches were these.

Answer:

Doctor Veatch was a very learned man. He was a botanist, geologist, surveyor, chemist and physician.

Seventh Direct Interrogatory:

If in answer to the foregoing interrogatories you have stated that you were acquainted with Dr. John A. Veatch, then state whether your acquaintance with him was intimate or otherwise. Also state whether or not you ever lived in the community with John A. Veatch or in the community where he had lived.

Answer:

My acquaintance was not very intimate as he was traveling most of his time. I never lived in a community with John A. Veatch. I did live in a community in which he had lived.

Eighth Direct Interrogatory:

Were you acquainted with the character and reputation of John A. Veatch as to honesty and integrity in the community in which he lived? If yes, what was that character and reputation?

Answer:

I was acquainted with the character and reputation of John A. Veatch. He was trusted and honored by all who knew him. His character was good.

First Cross Interrogatory:

Please state how long you have resided where you now reside, and name each and every place you have resided in during your lifetime, and state the length of your residence in each of said places.

Answer:

I have lived in Napa, my present address, for nine years. I lived three years in Missouri, eleven years in Yolo County, California, twenty-five years in Lake County, California, two years in Mendocino County, California, five years in Butte County, California, seven years in Colusa County, California, and nine years in Napa County, California.

Second Cross Interrogatory:

If you have answered that you were acquainted with Dr. John A. Veatch, state whether or not you ever lived in the same family with said Dr. John A. Veatch about whom you are testifying, and if so, where.

Answer:

I never lived in the same house with Dr. Veatch, although he visited with us.

(a) Describe said Dr. John A. Veatch as particularly as you can, stating approximately his weight and the color of his hair and eyes, etc.

Answer:

He was a very tall man, considerably over six feet, fair and blue eyes. Weight about 200 pounds.

Third Cross Interrogatory:

State where you were living during 1845, 1846 and 1847,

and state whether you knew Dr. John A. Veatch during those years?

Answer:

I was not born until 1850.

Fourth Cross Interrogatory:

If you have answered that Dr. John A. Veatch at one time lived in Texas, name each and every county, city, town and village in which said Dr. John A. Veatch lived during his lifetime.

(a) State when said Dr. John A. Veatch came to Texas, and where he came from to Texas, and how old he was when he came to Texas, and state whether or not he was a colonist and whether he received any grant of land from the Government of Coahuila and Texas, or other sovereignty of the soil, as a colonist and if so, state where said land is located.

(b) State the different years during which Dr. John A. Veatch about whom you have testified resided in each of the counties in Texas in which you have stated that he lived, giving the dates when he moved to each of said counties, and the date that he left there.

Answer:

I make the same answer to this question as I made to direct interrogatory No. 4.

(a) I have no knowledge of this question.

(b) I do not know.

Fifth Cross Interrogatory:

State the name of the wife of the said Dr. John A. Veatch that you knew, and state what her nationality was, and state how many children the said Dr. John A. Veatch had by her, and name them, indicating which of them are

living and which are dead, and if any of them are girls give the name of the man or men they married.

(a) State when the wife of said Dr. John A. Veatch died, and where she died.

Answer:

Dr. Veatch had seven children by his first wife, Charlotte Veatch. J. Alfred, Samuel, Andrew Allen, James, Ada, Fannie and Kate. Ada married James Gitchell; Fannie married Mr. Sheridan, Kate died when a child: To the best of my knowledge they are all dead. I do not know the wife's nationality. Dr. Veatch had three wives. His last wife died just before he did in Oregon. This is all I know about it.

Sixth Cross Interrogatory:

It is a fact, is it not, that said Dr. John A. Veatch was a country doctor, during the time he lived in Texas, and that he was not a man of any extensive means but was dependent on his practice and what little surveying he did for a livelihood, and that he was not a man who had thousands of dollars to spend in the purchase of lands.

(a) Is it not a fact that said Dr. John A. Veatch practiced medicine in San Augustine County, at one time, and that on Sept. 16, 1841, he was indebted to the estate of John M. Sharp on two notes, one in the sum of \$13.38, and the other in the sum of \$15.94?

Answer:

I know nothing about the financial condition of Dr. Veatch while he lived in Texas.

(a) I was born in 1850.

Seventh Cross Interrogatory:

If you have answered that you were rather intimately

acquainted with said John A. Veatch, state how intimately you knew him, and state whether or not you ever heard him talk about his business affairs, and state whether you ever heard him speak of land transactions he had, and if so, state what he said about said land transactions.

(a) Is it not a fact that although you were intimately acquainted with said Dr. John A. Veatch, that you never heard him bear the reputation of being a large land owner and that you never heard him say that he owned large quantities of land and that you don't know anything at all about his owning any large quantities of land in different counties in east Texas from hearing him actually say anything about such ownership.

Answer:

I never heard Dr. Veatch mention any business affairs.

(a) I never heard him mention any land in Texas. I was not intimately acquainted with him.

Eighth Cross Interrogatory:

Is it not a fact that the said John A. Veatch whom you knew left East Texas in 1846 in Capt. George T. Woods company of volunteers having enlisted in said Company in Town Bluff in Liberty County, Texas, for service in the war between the United States and Mexico.

(a) Is it not a fact the said Dr. John A. Veatch that you knew and about whom you have testified joined the Second Texas Cavalry at Point Isabelle and was quartermaster of that regiment?

(b) Is it not a fact that after the said John A. Veatch that you knew enlisted in a company of cavalry commanded by M. B. Lamar, and that he joined this company of cav-

alry about October 1, 1846, he having Capt. Woods Company at Town Bluff about April 1, 1846, and having been mustered in at Port Isabelle on May 4, 1846.

Answer:

I know nothing of this.

(a) I do not know.

(b) I do not know.

Twelfth Cross Interrogatory:

If you have purported to testify as to the character or reputation of Dr. John A. Veatch as to honesty and integrity, and you state what that character was, please state what the occasion was upon which the character and reputation of Dr. John A. Veatch was under discussion, and what called forth the discussion or conversation about the character and reputation of Dr. John A. Veatch from which you acquired your knowledge of his reputation.

Answer:

His general reputation in the community where he lived and where I resided later were the very best and there were no acts of his to cause a discussion of his character.

(a) How old were you at the time you heard the character and reputation of Dr. John A. Veatch discussed, and how many times did you hear such character or reputation discussed and state the name of each and every person that you heard discuss the character and reputation of Dr. John A. Veatch and state where such conversation or discussion occurred, and how you came to particularly notice what was said in reference to the character and reputation of Dr. John A. Veatch.

Answer:

I repeat the answer just given.

(b) Is it not a fact that if a man is a good man or an honest man that ordinarily and in the great generality of instances his reputation never becomes subject of discussion and that it is only when a man is a bad man or dishonest or gets himself before the public eye in a light which is rather unfavorable to him that his character or reputation becomes the subject of discussion in the community in which he lives?

Answer:

Yes.

(c) What do you understand is meant by a man's reputation?

Answer:

A man's reputation is what the people of his community have to say about him, and where no one has anything to say against him I consider his reputation good.

(d) Have you testified as to the reputation of Dr. John A. Veatch exactly and entirely in the light of the definition of a man's reputation as stated by you in your answer to the last subdivision of this interrogatory?

Answer:

I have.

Thirteenth Cross Interrogatory:

Please state whether or not you are related to May Veatch, and how she is related to the John A. Veatch about whom you have testified, and also whether you are related to Chase Gitchell.

Answer:

May Veatch is my daughter and the granddaughter of

John A. Veatch. Chase Gitchell was a nephew of mine by marriage.

Fourteenth Cross Interrogatory:

Please state briefly, but at the same time, giving all important facts, dates and places of residence as near as you can the history of the life of Dr. John A. Veatch about whom you have testified, stating when and where he was born, if you know, when and where he died, the different places he resided in during his lifetime, the different occupations he followed, stating particularly where he resided between 1834 and 1846, and what he did between 1846 and 1850, and where he was between those years, and where he resided and what he did between 1847 and the time of his death, and state the name of his lineal descendants that you know of, and state which of them are dead, and state the place of residence of those of them who are living. Also name in like manner his collateral descendants, stating which are dead and which are alive, and stating the place of residence of those who are alive. State if you know the financial worth of Dr. John A. Veatch from 1834 to 1846.

Answer:

I have no direct knowledge of most of the life of Dr. Veatch. When I knew him he resided in San Francisco, California, but later removed to Oregon and died in Portland about February, 1870. His only lineal descendants that I have any direct knowledge of are Ada Gitchell who is dead; her sons Chase and Carwin, who are dead, and her son Allen and daughters Lilly and Myrtle, who all resided in San Francisco when I last heard of them; Fannie Sheridan who is dead and her

daughter Stella who resided in San Francisco when last heard of; and my son, J. Allen Veatch, who resides in Napa, but who is at the present time in South America, and my daughter, May Veatch Robinson, who resided in Oakland, California. The only one of his collateral descendants that I am personally acquainted is A. C. Veatch who resides in Washington, D. C., but when last I heard of him he was in England. I do not know the financial condition of Dr. Veatch from 1834 to 1846.

Mr. Gordon offers in evidence the original record of Tyler County, Texas, wherein is recorded May 26, 1856, being Vol. C p. 238 *et. seq.* an instrument denominated deed from James Morgan to W. W. Swain.

Mr. Kennerly: The agreement in force at the former trial of the case to read the instrument from this record has been rescinded by an agreement of the parties, and they are not to offer that instrument from this record. We have no objection to reading a correct copy of that record from the transcript in the case on trial, but we object to the use of the record in the Pollard case from which he proposes to read the instrument. It is not correctly copied in there.

Mr. Gordon: That is right. I will read a certified copy from the record. I want it to go in the record that I am reading from the record book of Tyler County. What I am actually reading is a certified copy by the clerk from that book. We have agreed not to bring the book here, but offer it as if the book were here:

"This indenture made this twenty-first day of November, eighteen hundred and forty-four, between James Morgan of the County of Harris, of the one part, and

Wm. W. Swain, of the same county, of the other part, witnesseth:

That the said James Morgan, for and in consideration of the sum of twenty-five hundred and seventy-seven dollars and eighty-three cents (\$2577.83), to him in hand paid by the said Swain, the receipt whereof is hereby acknowledged, the said sum of twenty-five hundred and seventy-seven dollars and eighty-three cents being the full amount of two judgments obtained by said Swain against William D. Lee, in the County of Galveston, to-wit judgment for note of said Lee in favor of Hyde and Goodrich, due 22nd May, 1839, for \$943.00, with interest etc., etc., making in all the above sum of \$2577.83, has granted, bargained, sold conveyed and by these presents doth grant, bargain, sell and convey to said Swain, his heirs and assigns, all his right, title and interest in and to a certain tract or parcel of land containing twenty-five hundred and seventy-eight acres, situated on the west bank of the River Neches in the Northern Division of the County of Liberty, being a part and parcel of one league of land granted to Charles A. Felder as a colonist by the State of Coahuila and Texas as per title from the Commissioner, George A. Nixon, bearing date at Nacogdoches the 29th day of August, 1835, and sold and conveyed by said Felder to John A. Veatch by deed bearing date in the County of Jasper on the 18th June, 1839, and by said Veatch sold and conveyed to said Morgan by deed bearing date Galveston, the 15th March, 1841, the said tract or parcel of land containing twenty-five hundred and seventy-eight acres, bounded as follows:

Beginning at the northeast corner of said league and running southwardly with the meanderings of the river to a point on the river to be determined by some competent surveyor; or from which a line drawn westwardly and parallel to the north line now established to the west or back line to the northwest corner of said league, and thence to the beginning, will comprise the twenty-five hundred and seventy-eight acres.

To have and to hold the said parcel of land containing 2578 acres as above described, with the appurtenances thereto belonging, unto him, the said Swain, his heirs and assigns forever, for his and their duly proper use and behoof and that the said Morgan for himself, his heirs and assigns, doth hereby covenant and agree to and with the said Swain, his heirs and assigns to relinquish all right, title and interest in and to the land above conveyed.

In witness whereof, the said James Morgan doth set his hand and affix his seal the day and year first herein written.

(Seal)

JAMES MORGAN.

Signed, sealed in presence of:

A. P. THOMPSON.

Republic of Texas,

County of Harris. Before me, A. P. Thompson, Chief Justice of the County of said County Exofficio Notary Public came James Morgan and acknowledged that he signed and sealed the foregoing instrument and delivered the same as his binding act and deed.

To Certify which I have hereto signed my hand and put the seal of my court this 15th day of October, A. D. 1845.

A. P. THOMPSON, Chief Justice
H. C. Exofficio Noty. Public.

L. S. A. J. R. 10.
State of Louisiana,

City of New Orleans. I, Edward Hall a commissioner for the state of Texas, do hereby certify that the within is a true copy of the original deed of conveyance from James Morgan to Wm. W. Swain, which deed was mailed for and directed to the County Clerk of Tyler County, Texas, for record on the 21st day of April, 1855, and has not been heard from since.

In testimony whereof I have hereto set my hand and seal of office this fourth day of May A. D. 1856.

EDWARD HALL, Commissioner.
(LS)

N. B. In the 4th line *age* 2, of the manuscript (Texas) was interlined. Filed in my office for record this the 20th day of May, 1856, at 6 o'clock P. M.

E. J. PARSONS, Co. Clk. T. C.

I hereby certify that the above & foregoing as recorded is a true copy of the original as filed and duly recorded this the 22nd day of May, A. D. 1856, at 10 o'clock A. M.

E. J. PARSONS,
C. Clk. T. C. Texas."

Judge Kennerly: He is now offering the record from Tyler County of a deed from James Morgan to W. W. Swain,

We object to the offer of that record, first for the reason that the instrument contained on that record is not a deed, but what purports to be a copy of a deed, made by Edward Hall, reputed to be a Commissioner of Deeds of the State of Texas and Louisiana ten years after the purported execution of the deed, and nine years after the purported acknowledgment of the deed. That the instrument spread upon that record is not such an instrument as is permitted or required by the law to be recorded. That the record is a nullity and the instrument is illegally there, and that the instrument on that record is not a public record. Neither a certified copy of it nor the record itself would be admissible to prove anything in this court.

The Court: The copy is on p. 180 of the record in this case.

Judge Kennerly: We make the further objection that if it is contended that that instrument is entitled to admissibility because of the fact that it has been of record in Tyler more than ten years, that the record in Tyler County does not avail them for the reason that the land is in Hardin County. We make the further objection that the recitations in that record recite a deed from Felder to Veatch and from Veatch to Morgan, and that would not be admissible in this case.

The Court: I will not now decide that it is not admissible, but if it should come to me as a solitary circumstance in the case, I would decide that it was not admissible. I will reserve the ruling on it until I see how much proof is offered as to the existence of the deed.

The Court to The Jury: The instrument just offered purports on its face to be a copy from an original deed made by a man named Edward Hall who styled himself a Commissioner of the State of Texas, and that copy so made by Hall was

tendered for record in Tyler County and received and placed on record. That is offered by the plaintiffs, and the court does not admit it in evidence yet. I don't know whether I will admit it or not. It is offered and I retain the question, and until I do inform you that it is admitted you must not consider it.

Judge Kennerly: Is it offered by both interveners and plaintiffs?

Mr. Gordon: I have limited it as against the defendants, and do not offer it as against the interveners.

Judge Kennerly: We make the further objection that there can not be a limited offer for the reason that the plaintiffs and interveners are fighting together, and there is no such thing as offering it against one and not against the other.

The Court: For the present the deed is retained by the court and not admitted or excluded. I will keep control of the question for the present.

Mr. Gordon: I offer in evidence deed from W. W. Swain to Robert Rose, dated January 5, 1846. It is a certified copy from Tyler County, Book D, pp. 179 and 180; it was filed and recorded there on the 5th of October, 1858, at nine o'clock P. M. This deed was duly acknowledged before A. P. Thompson, Chief Justice of Harris County and ex officio Notary Public:

"Republic of Texas
County of Harris.

Know all men by these presents, that I, William W. Swain for and in consideration of the sum of seventeen hundred and twenty-one dollars to me paid Have granted bargained sold released and conveyed and by these pres-

ents do grant bargain sell release and convey unto Robert Rose his heirs &c all my right title interest and claim in and to the following described property lying and being situated in the County of Liberty to-wit: seventeen hundred and twenty-one acres of land to be surveyed out of a tract of land by me purchased on the 21st day of November A. D. 1844 from James Morgan by said Morgan to J. A. Veatch being part of the head-right of Chas. A. Felder all of which with a full description of the said land will be found in said conveyances of Morgan to me which said conveyance is made part of this instrument for the purpose of identifying the land hereby intended to be conveyed together with all and singular the rights members hereditaments and appurtenances to the same belonging or in any wise incident or appertaining. To have and to hold unto him the said Robert Rose his heirs and assigns forever all and singular the above described and conveyed and conveyed premises and I hereby bind myself my heirs &c to warrant and defend the same to Rose his heirs and assigns against the claim of any person whomsoever claiming or to claim the same by through or under me.

Witness my hand and seal (with scroll for seal) this fifth day of January A. D. 1846.

W. W. SWAIN (L. S.)

Witness A. P. THOMPSON

Republic of Texas

County of Harris.

Before me A. P. Thompson Chief Justice of the County Court of said County Exofficiona Notary Public

came Wm. W. Swain and to me acknowledged that he signed and sealed the instrument on the reverse hereof and delivered the same as his binding act and deed.

To certify which I have hereunto signed my name and put the seal of my Court A. D. 1845. (L. S.)

A. P. THOMPSON.

Chief Justice H. C. Exofficio Not. Pub.

Filed in my office for record this the 19th day of July A. D. 1858 at 4 o'clock P. M.

E. J. PARSONS, Co. Clk. T. C.

I hereby certify that the above & foregoing deed &c was duly recorded in record book "D" on pages 179 & 180 and that the same as recorded is a true copy of the original as filed & was recorded this 5th day of Oct. A. D. 1858 at 9 o'clock P. M.

E. J. PARSONS, Co. Clk. T. C.

State of Texas

County of Tyler

I, Ed. Pope County Clerk in and for Tyler County, Texas, do hereby certify that the foregoing is a true and correct copy of the deed from W. W. Swain to Robert Rose as the same appears of record in my office in book "D" on pages 178 & 179 Deed Record of Tyler County, Texas.

Given under my hand and seal of office this 3rd day of November A. D. 1911.

ED. POPE

County Clerk Tyler County, Texas"

Judge Kennerly: Our objection is that this deed purports to have been recorded in Tyler County on the 5th of October,

1858—that is, purports to have been filed for record at that date. It was after the date of the organization of Hardin County in which the land is situated, and the copy offered is a certified copy from Tyler County, which does not show to have been recorded in Hardin County, and is therefore not admissible as a certified copy. It can not be offered in evidence unless it is recorded in the County where the land is situated. My recollection is that Hardin County was created in January, 1858.

Mr. Gordon: I think Judge Kennerly is mistaken about that. The courts have held since the Townsend Act went into effect that a certified copy of a deed from a County in which it was originally filed is admissible in evidence in the absence of any issue of notice.

Judge Kennerly: We object to it. It would not come under that act because it is not recorded in the County in which the land is situated, and the rule could not apply in this instance.

The Court: One of the objections raised is that at the time of the recordation of this instrument Hardin County had been created. I don't know whether the fact would be established by the history of the creation of Hardin County. I will retain the ruling on that objection.

Judge Kennerly: I want to make another objection, and that is that the deed offered from Swain to Rose is not properly acknowledged, in that it shows upon its face that the acknowledgment is dated prior to the date of the date of the deed, and that its record in Tyler County in ten years would not cure that acknowledgment under the law then in force.

Mr. Gordon: Here is an agreement of counsel in this case on pp. 226 and 227 of the printed record, which cures

the objection. This agreement has not been modified except as to the copy of the deed. The third paragraph of the agreement on p. 227 reads: "It is further understood and agreed that the foregoing agreement in reference to reading from the record in the cause of Uriah Pollard v. Houston Oil Company of Texas, shall not preclude either party from offering any other evidence it may desire to offer." Mr. Gordon reads the entire agreement contained on pp. 226 and 227 of the printed record. (This agreement is elsewhere copied in full in this bill.)

Judge Kennerly: I don't think the agreement helps him out any as to this matter.

The Court: I don't think if the objections are well taken, they would be cured by the agreement.

Mr. Gordon: I first thought the agreement went to that question, but perhaps it does not. I am sure the court can retain the question and let us proceed, and we can later present authorities in support of our contention that this is a duly certified copy of a duly recorded deed.

The Court: One objection is that the certificate of acknowledgment purports on its face to have been given a year prior to the signature of the deed. The deed was signed January 5, 1846, and the acknowledgment bears date in 1845.

Mr. Gordon: I submit that would go to its weight rather than its admissibility.

The Court: You may present the authorities after dinner. We had better not retain too much. I will retain this deed until after dinner. The objections to this deed are not exactly on the same footing as the objections to the first deed, because that deed is not offered as a muniment of title, but as a circum-

stance to show that the muniment did exist at that time. It rests on a different foundation.

Mr. Gordon: In the same connection, we offer the record from Tyler County in evidence as a circumstance to show or tending to show that such original instrument did exist, to-wit: Book D pp. 178 and 179.

Judge Kennerly: We make the same objection, and the further objection that the record is not admissible because it is not the proper place for the record of the instrument, not being the County in which the land lies.

Mr. Gordon: I offer the record of the original deed as a circumstance.

The Court: I will wait until after dinner to decide both questions. I do not admit it in evidence yet. You can produce the authorities after dinner.

Mr. Gordon: We now offer in evidence certified copy of a deed from Robert Rose to John N. Rose, dated August 4, 1854, duly acknowledged before James Welch Notary Public of Galveston County, Texas, on the 27th of January, 1855, filed for record in Tyler County on the 3rd of August, 1859, at 9 o'clock A. M. and duly recorded in Book D pp. 485 *et seq:*

"The state of Texas,
County of Galveston.

Know all men by these presents, that for and in consideration of the sum of seventeen hundred and twenty-one dollars to me in hand paid, the receipt whereof is hereby acknowledged I, Robert Rose, of the City of Galveston and State aforesaid, have granted, bargained,

sold and conveyed and by these presents do grant, bargain, sell and convey unto John N. Rose, of the City of Houston and State aforesaid all my right, title and interest in and to seventeen hundred and twenty-one acres (1721) of land situated on Neches River in the County of Jefferson, being a part of the headright league originally granted to Charles A. Felder, to have and to hold the above granted and described property unto him said Rose, his heirs, and assigns forever, free from the claim of all persons claiming or to claim by or under me.

Given under my hand and seal this fourth day of August, A. D., 1854.

ROBERT ROSE. (Seal)

(A scroll for a seal.)

Witnesses:

R. D. JOHNSON,
SAM'L. M. WILLIAMS.

State of Texas,
County of Galveston.

Before me, James Welsh, a notary public for the county and State aforesaid this day personally appeared R. D. Johnson to me known who being duly sworn deposeth and saith he was present and did see Robert Rose whose name appears at the end of the foregoing instrument of writing sign, seal and deliver the same as his voluntary act and deed and for the purposes and consideration set forth, and he the said Johnson signed the said instrument together with Sam'l M. Williams as subscribing witnesses at the request of the said Robert Rose.

In testimony whereof, I grant these presents under my signature and the impress of my official seal at the City of Galveston, this 27th day of January, A. D., 1855.

JAMES WELSH,
Notary Public, G. C.

Filed in my office for record this the 2nd day of August, A. D., 1859, at 9 o'clock A. M.

E. J. PARSONS,
Co. Clk. T. C.

I hereby certify that the above and foregoing deed &c is a true copy of the original as filed in my office for record and was duly recorded this the 4th day of August, A. D., 1859, at 9 o'clock A. M.

E. J. PARSONS, C. C. T. C.

State of Texas,
County of Tyler.

I, Ed Pope, County Clerk of Tyler County, Texas, do hereby certify that the foregoing is a true and correct copy of the deed from Robert Rose to John N. Rose as appears of record in my office in book "D," pages 485 and 486 and 487, deed records of Tyler County, Texas.

Witness my hand and official seal this the 12th day of October, 1908.

(Seal) ED POPE,
County Clerk, Tyler County, Texas."

Judge Kennerly: We make the same objections to this deed as were made to the previous deed from Swain to Rose, except that the objection to the acknowledgment of the deed from Swain to Rose is not made. My objection is that it is a certified copy from Tyler County instead of a certified copy from Hardin County. The objections I make are exactly the

same as those made to the deed from Swain to Rose except as to the acknowledgment. We claim the deed is not admissible for any purpose. With the exception mentioned, our objections are the same as those the court takes under advisement until afternoon.

The Court: You make no objection that the execution is not proven?

Judge Kennerly: No, sir, we make the objection that the certified copy is a certified copy from Tyler County where the land is not situated and was not situated at the time the deed was executed and recorded, and therefore a certified copy from that County not recorded in Hardin County is not admissible for any purpose.

Objections overruled.

Defendants except.

Judge Kennerly: We wish the objections to show that we object to the recitations as to what the prior deeds showed on the ground that they are self-serving.

Objection overruled.

Defendants except.

Mr. Gordon: We offer in evidence from John N. Rose to William M. Goodrich, dated January 1, 1871, and acknowledged January 12, 1871, and recorded in Vol. 13 p. 23 of Williamson County Deed Records. It conveys this land and some land in Williamson County. It is a certified copy from Williamson County, Texas. It appears on p. 188 of the printed record in this case.

Plaintiffs next offered in evidence deed from John N. Rose to Wm. M. Goodrich dated January 12, 1871, filed for

record February 21, 1871, recorded in the Deed Records of Jefferson County, Texas, volume p. page 253, as follows:

"Know all men by these presents: That I, John N. Rose of the City of Lynchburg, State of Virginia for and in consideration of one dollar to me in hand paid, the receipt whereof is hereby acknowledged, have granted, bargained, sold and quitclaimed, and by these presents do grant, bargain sell and quitclaim unto William M. Goodrich his heirs and assigns, all my right, title and claim in and to the following described tract^s of land, one tract situated in Williamson County, State of Texas, known as the Magill Headright and patented to Robert Rose Assignée of said Magill by the State of Texas, the other tract of Seventeen Hundred and Twenty-one acres situated on the Neches River in the County of Jefferson, in said State of Texas, which said tract was conveyed to said Robert Rose by Wm. M. Swain and to be taken out of a certain tract of land purchased from J. A. Veatch being part of the headright of Charles Felder both of which said tracts of land were heretofore conveyed by said Robert Rose to me said John N. Rose.

To have and to hold the above granted and described premises unto him said Goodrich his heirs and assigns forever free from the claim or claims of all persons whomsoever claiming or to claim the same by through or under me.

Witness my hand and seal this 12th day of January, A. D., 1871.

JOHN N. ROSE.

(Fifty Cent Stamp)

State of Virginia
County of Campbell
and City of Lynchburg.

Personally appeared before me James Garland Judge of the Corporation Court of the City of Lynchburg, John N. Rose, who acknowledged that he signed sealed and delivered the foregoing instrument for the consideration and purposes therein expressed.

In testimony whereof I have hereto set my hand and caused the seal of the Court to be affixed this 12th day of January, A. D., 1871.

(Seal) JAMES GARLAND, Judge
of the Corporation Court of the
City of Lynchburg in the County
of Campbell, State of Virginia.

John N. Rose to Deed Wm. M. Goodrich, filed for record in my office at 12: M. February 21st, A. D., 1871.

W. F. GILBERT, Dist. Clerk. J. C."

(Then follows the Certificate of the County Clerk of Williamson County that same is a true and correct copy.)

Judge Kennerly: We object to this certified copy, first because it purports to have been acknowledged before James Garland, Judge of the corporation court of Lynchburg, Va., and such an officer was not at that time authorized to take acknowledgments to deed to lands in Texas; second, the certified copy shows to have been made by and come from the office of the County Clerk of Williamson County, the land in controversy being in Hardin County, and having been in Hardin County at the time the deed was offered for record, a certified copy from Williamson County is not admissible either as a circumstance or as a muniment of title, it not being shown that this certified copy was recorded in Hardin County.

Objections overruled.

Defendants except.

Judge Kennerly: I make the further objection that if it is contended that the validating act of 1905 renders this instrument admissible, the answer to that is that the deed had not been recorded in Hardin County for ten years as required by the validating act.

Objections overruled.

Defendants except.

Mr. Gordon: I now offer in evidence from the index of the Deed Records of Hardin County, Book 1—it was destroyed by fire in 1886, certified copy of the index referred to as follows: "General index of deeds: To grantor—I believe I will just offer it from the printed record pp. 191 and 192, and we offer the agreement on p. 191 of the printed record that this record Book I was destroyed by fire in 1886:

It was agreed that Book I of the Deed Records of Hardin County was destroyed by fire in 1886.

The certified copy of the index referred to was as follows:

General Index of Deeds Direct. To

Grantor	Grantee	Book	Page
John N. Rose	Wm. Goodrich	I	5

Line 27 Vol. 1,326.

General Index of Deeds Reverse. From

Grantor	Grantee	Book	Page
Wm. Goodrich	John N. Rose	I	5

Line Five Vol. 1. page 137.

(Here follows the Certificate of the Clerk of County Court of Hardin County that foregoing is true copy.)

Judge Kennerly: We make the objection now, since they have offered the purported copy of the record of the index, that it is not shown that this deed remained on the records of Hardin County for ten years, so as to bring it within the validating act of 1905, so as to cure the acknowledgment. It is not shown whether it was recorded one year, two years or ten years before 1886, and the deed must be rerecorded before it is a record. In other words, since it is shown by the record that the record book in which the deed was recorded was destroyed in 1886, and it is not been shown that the deed was rerecorded, or that the record book has been reestablished or reproduced, and under the laws of the State of Texas the record is destroyed or there is no record, and the validating act of 1905 would not have the effect of making the acknowledgment taken by an officer not authorized to take it good.

Objection overruled.

Defendants except.

Mr. Gordon: I offer an admission in the record in cause No. 1997, Houston Oil Company of Texas v. Uriah Pollard et. al. on p. 17 in their pleadings, "That if the said James A. Morgan—

"That if the said James A. Morgan acquired any title under the said John A. Veatch conveyance, he conveyed to William W. Swayne, on November 21, 1844, 2,578 acres out of said league, and on the.... day of....., 1846, he conveyed 1,850 acres out of said league to W. D. Lee, and the said title so conveyed to W. D. Lee is now outstanding in him and his vendees and is the land in controversy herein."

Judge Kennerly: Wait a minute and let the court read that. We object to that for the reason that it is not such an admission in the pleading in a case in which these plaintiffs and interveners were not parties as would bind these defendants. That it particularly would not bind the Kirby Lumber Company and the Maryland Trust Co. because it is not an admission that purports to have been made by the attorneys of those parties, but an admission made by the attorneys for the receivers. I don't think the Kirby Lumber Co. was a party to that suit. The Kirby Lumber Company was a party to the suit. The Maryland Trust Co. was not a party to this particular pleading.

The Court: Was there a controversy in that suit as to whether Mr. Veatch had conveyed his title to Morgan?

Mr. Gordon: Yes sir, that was a part of the controversy.

The Court: If that is true, it seems to me to be an additional admission.

Judge Kennerly: We have a further objection to make to the admission in the pleading. Does the Court exclude that?

The Court: No sir, I have not acted upon that at all.

Judge Kennerly: We make the further objection that the alleged pleading is not executed and signed by the President and Secretary of the two corporations as required by the equity rules in that court at that time. Again, that the alleged admission in the pleadings is not an admission, but a plea in the alternative.

The Court: That is to be considered by the court in connection with the offer of the deed from Morgan to Swain.

Judge Kennerly: I wish to make the further objection if that admission was made, it was made under the impression that the deed from James Morgan to W. W. Swain was correctly copied in the evidence and transcribed in the case in which the admission is alleged to have been made, and they made it without knowledge that the deed was on the records of the county in the shape it is shown. They made the admission in reference to the deed as copied which is not like the alleged certificate.

The Court: I prefer not to yet act upon the admission of the deed from Morgan to Swain. I presume this allegation contained in the record of the suit in the Southern District is offered for the purpose of showing there has been a judicial admission by the parties to the suit, and as a circumstance. I do not pass on the question now. I will retain the whole question. I am inclined to think that it is not such a judicial admission that could be received by the court as bearing on the question. I don't think it meets the requirements of a judicial admission. I will dispose of the deed offered from Swain to Rose contained on p. 184 of the record to which you have offered objections.

The Court: The question here is whether if an instrument is properly acknowledged, particularly where there is an agreement that the original has been destroyed, it can be received in evidence. I will overrule the objection to the deed from Swain to Rose and admit it in evidence.

Defendants except.

Mr. Gordon: Reads the deed from p. 184 of the printed record.

Judge Kennerly: That includes the objections as to the recitations of the other documents.

The Court: Yes, sir.

Mr. Gordon: We read the deed from Robert Rose to John N. Rose following that.

Mr. Gordon: We next offer the deed from John N. Rose to Goodrich p. 188 of the printed record. I believe I read that this morning.

Mr. Gordon: I want to introduce in addition to the circumstances already in evidence in support of the deed from Morgan to Swain agreement of counsel in cause No. 1997, Houston Oil Co. of Texas, et. al. v. Uriah Pollard et. al. from p. 44 of the record in that cause. We do not offer it as an estoppel, but as a circumstance in connection with other circumstances which will follow tending to show that Morgan conveyed this land to W. W. Swain, the offer being made, not as against the interveners, but against the defendants.

Judge Kennerly: Our objections are that this purported agreement does not include the lands involved in this suit, was made between parties other than the parties now before the court and based upon no consideration binding upon the defendants now before the court, and particularly that it was made with the impression and under the belief that the deed from James Morgan to W. W. Swain was correctly put in evidence in the case in which the purported agreement was made, and in support of that I will state this on oath, if counsel desires.

The Court: I will hear from the other side on the agreement you can state all your objections.

Judge Kennerly: I will state this objection, and I will be sworn if you like: While my name does not appear to

the pleadings, I was connected with the Receivers at the time the agreement was made and I know it was not known—

Mr. Gordon: I object to that going into the record. If counsel wants to be sworn and give any excuse for the statement in the record, I want him to do it.

The Court: This agreement closes with this language: "May be read in evidence upon the hearing of the above named intervention, either before the Special Master or the Court, with like effect as though the same were, each and all, duly certified copies from the records of deeds of the counties where recorded, respectively, as shown thereby, and as though the same had been duly filed and notified as prescribed by law, and as though affidavits of the loss or nonprocurement of the same had been duly made, but all other objections are hereby reserved, the intention being to waive procurement of certified copies and filing and notice thereof, and the making of affidavits of the loss or non-procurement of the originals, but to reserve every other objection there may be." I will hear from you on that. I don't believe it is admissible.

Mr. Gordon: We have already offered just preceding this a solemn declaration made in a court of equity in answer to a bill involving a part of this Charles A. Felder league of land.

The Court: I have already read that. It is on p. 17.

Mr. Gordon: We offer this as a statement in a court having jurisdiction of this title adjudicating these other questions as a declaration against interest of these gentlemen, and as a circumstance tending to show that they had some notice and knowledge and information that we are not able to produce here. The admissibility of it is based on the proposi-

tion that I seek to show by special evidence that a certain deed was made, and that they have had, as the evidence will show, considerable experience with the title to the Felder league of land.

The Court: I sustain the objections to the agreement. Plaintiffs except.

Mr. Gordon: I now renew the offer of the matter in the pleadings on p. 17 that I started to offer before dinner. It is in the answer of the Houston Oil Co. and the Kirby Lumber Co.

The Court: Objections have been made to it and I have reserved it. I have not excluded or admitted it yet. I retain the ruling on that with the deed.

Mr. Gordon: I now want to offer in evidence the fact as a circumstance that the defendant Houston Oil Co. of Texas on another trial of this case, the former trial, offered in evidence this very deed to which they now object as set out in the record p. 519, in connection with that on p. 664, assigned as error in this court and presented to the Circuit of Appeals, the assignment of error complaining of the refusal of the court to submit to the jury the question that such deed actually existed.

Judge Kennerly: Our objection is that that instrument if offered was offered as against the interveners and not against the plaintiffs is my recollection; second, that the case is being tried *de novo*, and the parties are not bound by any evidence in the previous trial. That the offer of that evidence, if offered, does not estop them from objecting to the admissibility of it at this time. Again, that the case presented at that time was different from now in that there was an agreement

erroneously made to read from the printed record in the Pollard case, and that document was gotten in evidence that way. The defendants offered this deed in order to get before the court a correct copy of that instrument.

Objection sustained.

Plaintiffs except.

Mr. Gordon: In the same connection we offer for like purpose proposition No. 7, on p. 221 with the statements of fact thereunder made in the brief signed T. M. Kennerly and Charles T. Butler, attorneys for the plaintiffs in error, Houston Oil Company of Texas, et al. in the Circuit Court of Appeals, when this case was up on writ of error.

Judge Kennerly: We make the same objections to that. Objections sustained.

Plaintiffs except.

The Court: I don't think you can prove the existence of a deed by showing that counsel made a certain proposition of law.

Mr. Gordon: It is offered on the theory that a party speaks in court through his counsel, and that his counsel is at liberty to explain anything he says.

Mr. Gordon: I now offer in evidence a notice served upon the plaintiffs and interveners in this case at this term of court duly filed among the papers in this cause. The portion offered is the fourth paragraph of the notice.

Judge Kennerly: We make the same objections, and in addition that it is simply the notice required by law to be given to opposing counsel in order that we might offer in evidence this deed. It is the notice required by the statute and

it is not binding on the defendants in any manner. We do not offer the instrument and are not estopped by it.

Objection sustained.

Plaintiffs except.

Judge Kennerly: On Saturday, the plaintiffs offered in evidence as against the defendants only a purported copy of the pleadings of the Houston Oil Co. and the Kirby Lumber Co. in the intervention of Ellen Lee Mason, from the printed record. We wish to make the further objection to reading from the printed record that it is not covered by the agreement in this case. We object further that the copy offered is not certified to or otherwise proven so as to make it admissible.

The Court: I had already sustained the objection to that.

Mr. Gordon offers in evidence the deposition of Edward L. Montgomery, p. 195 of the printed record.

The witness, EDWARD L. MONTGOMERY, testified by deposition for plaintiffs, as follows:

First Direct Interrogatory:

Please state your name, age and place of residence.

Answer:

Edward L. Montgomery, age 56 years, residence 98 Sixth Ave., Brooklyn, New York.

Second Direct Interrogatory:

Please state what business you are engaged in and how long you have been so engaged.

Answer:

Retired from business.

Third Direct Interrogatory:

This is a suit by the heirs of Wm. M. Goodrich, deceased, to recover a portion of the Chas. A. Felder survey in Hardin County, Texas. State whether or not you ever knew Wm. M. Goodrich, and if so, when and where did he die, if he is dead?

Answer:

Knew Wm. M. Goodrich. He died at Poughkeepsie, N. Y., in January, 1881.

Fourth Direct Interrogatory:

If you have stated that you knew Wm. M. Goodrich, and that he is dead, please state whether or not at the time he died he left surviving him a wife and children: if yea, then give the name of the wife and the names of all the children, and state particularly whether each of said children is now living or is dead, and if dead, when and where did the death occur.

Answer:

He left surviving him a wife and three daughters. Wife, Cornelia P. Goodrich—and daughters, Conelia G., Annie Louise and Mary W. Montgomery—two are now living, Annie Louise died in June, 1902, at Poughkeepsie, New York.

Fifth Direct Interrogatory:

If you have stated that Wm. M. Goodrich had a daughter named Mary W. Goodrich, and that she is living, please state whether she ever married, and if she ever married whether she has now any living children, and if so, give their names, their ages and their present places of residence.

Answer:

Mary W. Goodrich is living. She married Edward L. Montgomery, September 22, 1879. She has three children all

living—Helen Eglindon Krasicka, aged 30, residing in Brussels, Belgium, Margaret Morse Montgomery, age 29, address 568 Park Ave. New York City, Edward L. Montgomery, aged 27, address 568 Park Ave., New York City.

Sixth Direct Interrogatory:

If you have stated that Wm. M. Goodrich had a daughter named Annie Louise Goodrich and she is dead, please state when and where did she die and whether she left a will or not; if she left a will, please state whether it was ever probated, and if so, where?

Answer:

Annie Louise Goodrich died at Poughkeepsie, New York, in June, 1902. She left a will which was probated in Dutchess County, New York, and in Polk County, Texas.

Seventh Direct Interrogatory:

You are advised that there is on record in the deed records of Polk County, Texas, what purports to be the last will and testament of Anna Goodrich, deceased, and it names as devisees thereunder Helen Montgomery, Margaret Montgomery and Edward L. Montgomery, Jr.

Please state if you know these parties, and if so, what relation are they to you and what relation to your wife. Answer fully.

Answer:

The parties mentioned in the said will, viz: Helen Montgomery, Margaret Montgomery and Edward L. Montgomery are the children of my wife, Mary W. Montgomery and myself.

181

Eighth Direct Interrogatory:

Please state whether or not Wm. M. Goodrich was ever married more than once, and if so, give particulars as to each marriage, number of children, etc.

Answer:

Wm. M. Goodrich was only married once.

Ninth Direct Interrogatory:

If you have stated that Wm. M. Goodrich left surviving him a wife, please state whether she ever married again, and if so, when and where and are there any children by such other marriage?

Answer:

The widow of Wm. M. Goodrich never married again.

Tenth Direct Interrogatory:

Please state whether or not there has come into your custody from the estate of Wm. M. Goodrich, deceased, any original papers in regard to the Chas. A. Felder survey in Hardin County, Texas.

Answer:

There never has come into my possession any original papers in regard to the Chas. L. Felder survey in Hardin County, Texas, from the estate of Wm. M. Goodrich.

Eleventh Direct Interrogatory:

(a) If you have stated that there came into your possession certain papers in regard to this survey, please here and now give a list of each and every such papers that has come into your possession. (b) If you have now in your possession any of these original papers, please here and now make me a list of such papers, numbering them from one up and identify them by writing your name across the back of each one and

attach them to your deposition properly marked for reference and have the notary to endorse his name on them. (c) If you have had other papers in regard to this survey and do not have them in your possession, here give a list of such papers as best you can, and state what became of them.

Answer:

(No answer given.)

Twelfth Direct Interrogatory:

(a) State whether or not you ever knew John N. Rose, and if so, what relation, if any, was he to Wm. M. Goodrich;

(b) State whether or not John N. Rose and Wm. M. Goodrich were associated together in any business transaction, and if so, state the relationship they bore to each other as to such business transactions.

(c) Have you in your possession any letters or documents signed by John N. Rose, and if so, attach them all to your answers and mark them by signing your name and having the Notary also to sign it.

Answer:

I never knew John N. Rose. He was associated with Wm. M. Goodrich in a great many business transactions. I am unaware actually what the relation was they bore to each other as to such business transactions. I have letters from John N. Rose, to Wm. Goodrich but they do not touch on the subject in hand.

Thirteenth Direct Interrogatory:

Please search among all your papers and in every place where any papers that refer to this land may be and see if you cannot find the following papers. First: Deed from Chas. A. Felder to John A. Veatch, dated June 18, 1839. Second: Deed from John A. Veatch to James Morgan, dated

March 15, 1841. Third: Deed from James Morgan to Wm. W. Swain, dated November 21, 1844. Fourth: Deed from Wm. W. Swain to Robert Rose, dated January 5, 1846. Fifth: Deed from Robert Rose to John N. Rose, dated August 4, 1854. Sixth: Deed from John N. Rose to Wm. M. Goodrich, dated January 1, 1871. If you find any of the above papers, please attach them to your answers and mark them for identification; have you made diligent search for the above papers; if so, please state what search you have made, and what were the results of the search.

Answer:

I made diligent search for the deeds mentioned in this interrogatory and failed to find them.

Fourteenth Direct Interrogatory:

Please state whether or not Mr. Goodrich during his lifetime and his heirs since his death, have asserted claim of ownership to the land deeded to Mr. Goodrich by Rose in the Felder league in Hardin County. If yea, state in what such assertion of claim of ownership consisted.

Judge Kennerly: We object to the part about what his daughter says as hearsay.

Mr. Gordon: I don't offer that. I only offer the first sentence of the answer to interrogatory 14. The balance is omitted:

Answer:

I am unaware whether W. M. Goodrich during his lifetime claim of ownership to the Felder league.

Fifteenth Direct Interrogatory:

Please state whether or not Mr. Goodrich or his heirs ever employed agents in Texas or attorneys to represent

said interests in said land, and if so, what agents or attorneys; answer fully, giving the names of such persons, and when and where the business was entrusted to them, and what they did, if you know, in connection therewith.

Answer:

Mr. Goodrich's agent, for some years before his death, was the firm of H. M. Trueheart and Co. of Galveston, Texas, who had full charge of and possession of all papers connected with his interests in Texas. These papers or a portion of them were on my order transferred to J. A. Pendarvis of Houston, Texas, but no papers referring to the Felder League were amongst those turned over.

Sixteenth Direct Interrogatory:

State any other facts that may be within your knowledge concerning said matter which would tend to be of benefit to either the plaintiffs or defendants in said case, whether you have been specially interrogated concerning the same or not.

Answer:

(No answer given.)

Mr. Gordon: I don't offer the cross interrogatories and answers.

Judge Kennerly: We will offer some of them. We wish to read the last sentence of the answer of the witness to the 14th direct interrogatory. I objected to the middle sentence. (Reads last sentence.)

"No direct claim has so far been made by Mr. Goodrich's heirs, except in the course of the present proceedings."

Judge Kennerly: We offer the answer to the tenth cross interrogatory. It is not in the printed record, and we offer

it from the original deposition. We offer the 16th cross interrogatory and answer:

Tenth Cross Interrogatory:

Q. State, if you know, whether William M. Goodrich ever paid any taxes on the Charles A. Felder league, and whether he ever rendered any portion of the Charles A. Felder league for taxation. Do not state what you suppose in reference to the payment of taxes and rendition of this land by William M. Goodrich, but only what you know. We do not care for your opinion on these matters.

(a) If you have answered that said William M. Goodrich did in fact pay taxes on any portion of this land, attach to your deposition, marking with your name for identification, all tax receipts which you have in your possession showing payment of taxes by said William M. Goodrich on this land, or any part of it. If the parties about whom you have testified and who purport to be the heirs of William M. Goodrich have paid any taxes on the land, attach to your deposition all tax receipts which you have in your possession showing payment of taxes by them.

To the Tenth Cross Interrogatory he says:

I am without any information as to taxes, on the Felder League.

Sixteenth Cross Interrogatory:

Are you one of the plaintiffs in this suit, or not?

To the Sixteenth Cross Interrogatory he says:

I am one of the plaintiffs in this suit.

Mr. Gordon: Of the crosses we offer the 12th and answer:

Twelfth Cross Interrogatory:

If you have answered that you were once acquainted with John N. Rose, please state whether said John N. Rose was ever married, and if so, the maiden name of his wife, or of each of his wives, if he was married more than once. Please state where said John N. Rose was born and when, and when he died, and where.

To the Twelfth Cross Interrogatory he says:

William M. Goodrich and John W. Rose were associated in Texas interests, during a period covering many years. This was a matter of common knowledge in the family of Mr. Goodrich.

Mr. Gordon: We offer the deposition of Mary W. Montgomery, p. 200 of the printed record, taken in April.

The witness, MARY W. MONTGOMERY, testified by deposition for plaintiffs as follows:

First Direct Interrogatory:

Please state your name, age, and place of residence and how long you have resided in such place.

Answer:

My name is Mary Willis Montgomery, age 50 years, residence 568 Park Avenue, New York City, where I have lived two years.

Second Direct Interrogatory:

Please state whether or not you ever knew Wm. M. Goodrich, deceased, and if so, when was it and for how long a time?

Answer:

Yes, sir, from my birth until his death.

Third Direct Interrogatory:

(a) Please state whether or not you are related to the said Wm. M. Goodrich, and if so, what relation; (b) Please state whether or not Wm. M. Goodrich is dead, and if dead, when and where did he die.

Answer:

I am the daughter of William M. Goodrich. He is dead. Died in January, 1881, at Poughkeepsie, New York.

Fourth Direct Interrogatory:

If you have stated that Wm. M. Goodrich is dead, state whether or not at the time he died he left surviving him a wife and children; if you say he did leave surviving him a wife and children, please give the name of all such parties.

Answer:

He left surviving him, a wife and three daughters: Cornelia P. Goodrich, wife, Cornelia G., Daughter, Annie Louise, daughter, Mary Willis Montgomery, daughter.

Fifth Direct Interrogatory:

Please state whether or not said Wm. M. Goodrich was ever married more than one time, and if so, give the dates of such marriage—dates of the dissolution of each marriage, and how was it dissolved.

Answer:

William M. Goodrich was married only once.

Sixth Direct Interrogatory:

Please state whether or not the surviving wife of Wm. M. Goodrich was ever married to any other person than the said Wm. M. Goodrich, and if so, state whether she left any children by any other husband than Wm. M. Goodrich.

Answer:

The surviving wife of Wm. M. Goodrich did not marry again.

Seventh Direct Interrogatory:

If you have stated that Wm. M. Goodrich was your father, please, give here, if you have not already done so, the names of all of the children of Wm. M. Goodrich, and state whether each is now living or dead, and if any have died, please state whether they were married or single, and left issues; be particular and give all the details and all the dates of all the deaths and births, etc.

Answer:

Two of the daughters are living, i. e. Cornelia G. and Mary W. Montgomery. Annie Louise died single.

Eighth Direct Interrogatory:

Please give the names of your children by your husband E. L. Montgomery, and state whether they are living or dead, and whether they are married or single, and if they are married, give the names of their husbands or wives.

Answer:

Hellen Eglinton Krasicka, Margaret Morse Montgomery, Edward L. Montgomery, Jr. Hellen Eglinton is married to Count Jean Krasicka of Warsaw, Russia.

Ninth Direct Interrogatory:

What relation, if any, are you to E. L. Montgomery, Jr.?

Answer:

My son.

Tenth Direct Interrogatory:

Please state whether or not any papers concerning the

estate of Wm. M. Goodrich, deceased, have ever come into your possession, and if so, what has become of them, and where are they now; give a specified and detailed account of all the papers you received and all the papers you have now in your possession, and if you have parted the possession of some of them, state what became of them and what papers they were.

Answer:

I have had possession of no papers concerning the estate of Wm. M. Goodrich, at any time.

Seventh Direct Interrogatory:

Please search among your papers in every place where papers might be found that concern the Chas. A. Felder survey in Hardin County, Texas, and if you find any, attach them to your answer and mark them with your name for identification, and have the notary also sign his name thereto; have you done so?

Answer:

A thorough search has been made for any Felder papers, with no success.

Judge Kennerly: We want to read the third direct interrogatory and answer of the deposition of Mary W. Montgomery taken November 8, 1912. We also offer the fourth cross interrogatory and answer thereto; we also offer interrogatory sixth and answer thereto:

3.

Please state whether or not there has come into your custody from the estate of Wm. M. Goodrich deceased, any original papers in regard to the Chas. A. Felder survey in Hardin County, Texas.

In Answer to the Third Interrogatory She Saith:

No papers in regard to the Chas. A. Felder survey in Hardin County, Texas, have come into my possession.

4.

(a) If you have stated that there came into your possession certain papers in regard to this survey, please here and now give a list of each and every such paper that has come into your possession (b) If you have now in your possession any of these original papers, please here and now make me a list of such papers, numbering them from one up and identify them by writing your name across the back of each one and attach them to your deposition properly marked for reference and have the Notary to endorse his name also.

(c) If you have had other papers in regard to this survey and do not have them in your possession, here give a list of such papers as best you can and state what became of them.

In Answer to the Fourth Interrogatory She Saith:

(a) and (b) I can give no list of such papers as I have never had any.

(c) I never had any of the papers in my possession, and cannot make a list thereof.

6.

Please search among all your papers and in every place where any papers that refer to this land may be and see if you can not find the following papers: 1st: Deed from Chas. A. Felder to John A. Veatch, dated June 18th, 1839; 2nd. Deed from John A. Veatch to Jas. Morgan, dated March 15th, 1841. 3rd: Deed from Jas Morgan to Wm. W. Swain, dated Nov. 21st, 1844. 4th: Deed from Wm. W. Swain to Robt. Rose, dated Jan. 5th, 1846. 5th: Deed from Robt. Rose to

John N. Rose, dated Aug. 4th, 1854. 6th: Deed from John N. Rose to Wm. M. Goodrich, dated Jan. 1st, 1871.

If you find any of the above papers, please attach them to your answer and mark them for identification; have you made diligent search for the above papers; if so, please state what search you have made and what were the results of the search.

In Answer to the Sixth Interrogatory She Saith:

I never had such in my possession. My mother who had such of my father's Texas papers as were in his residence after his death, told me that she had had many of these papers burned because they were so voluminous and she had no place to keep them.

I have made no search here for the reason that I do not know where to look for such papers and believe that such of the papers as were in the house of my father at the time of his death have been burned.

Mr. Gordon: This deposition is dated November 8, 1912.

Mr. Gordon: We now offer another deposition of Mary W. Montgomery dated November 27, 1912:

Fourth Direct Interrogatory:

If you have recently found any old papers or abstracts of title in connection with the Charles A. Felder league in Hardin County Texas, please attach same to your deposition, and mark the same for identification, and if you know whose handwriting the said paper is in please state so in the said paper and in your answer.

Answer:

I now produce and send attached here to an old abstract

of title in connection with Charles A. Felder league in Hardin County, Texas, and have marked the same for identification. I am acquainted with the handwriting in which the superscription of said abstract of title is written, and of the first page of said abstract, and recognize the same to be in the handwriting of Lucien Minor, one of the partners of H. M. Trueheart & Co., of Galveston, Texas, who were the agents of my father, Wm. M. Goodrich. I am acquainted with the handwriting of all of the second and third pages of said abstract and identify the same as being in the handwriting of said Lucien Minor and I identify the same.

Mr. Gordon: We offer the abstract of title attached to the deposition:

ABSTRACT OF TITLE.

From Deed Records of Tyler County, as to 1721 acres (part of 1 league) of land, Abstract No., situated in Hardin County, Texas, and originally granted to Chas. A. Felder.
 Examined and stated by
 for Wm. M. Goodrich. 3151.

H. M. TRUEHEART & CO., Agents,
 At Galveston, Texas.

From Whom	To Whom	No. Acres	Date of Deed
Charles A. Felder	Joshua Smith	1 league	May 21, 1840
Charles A. Felder	John A. Veitch	" "	June 18, 1839
John A. Veitch	James Morgan	" "	March 15, 1841
Charles A. Felder	W. A. Daniel	" "	June 10, 1839

FILED FOR

CHARACTER OF

RECORD	DEED and REMARKS.	BOOK	PAGE
March 22, 1841	It appears from these records, to-wit Menard Co. records, that Felder conveyed the whole league three times. The record does not show when the deed from Veitch to Morgan was	A	9, 10
Oct. 1, 1839		A	72
		A	74

March 23, 1842

B

32

filed for record.
I think this league of
land lies in Jefferson Co.
and I presume the fur-
ther chain of title will
be found there as no far
ther chain appears on
records of Menard of
Tyler Co.

T. D. Rock.

Verified by me as being partly in the hand writing of Lucien Minor, one of the partners of H. M.
Trueheart & Co., of Galveston, Texas, who were agents for Wm. M. Goodrich.

MARY W. MONTGOMERY,
568 Park Avenue,
New York, N. Y.

November 7, 1912.

State of New York
County of New York, ss:

Sworn to before me the 7th day of November, 1912, as an abstract of title in the writing of
Lucien Minor by Mary W. Montgomery.

F. A. JOHNSON, Notary Public, No. 45,
New York County.

ABSTRACT OF TITLE.

From Deed Records of Jefferson County, as to 1721 (part of league) acres of land, Abstract No., situated in Hardin County, Texas, and originally granted to Chas A. Felder.
Examined and stated by
for Wm. M. Goodrich. 3151.

H. M. TRUEHEART & CO., Agents,
At Galveston, Texas.

From whom,; to whom;
No. acres,; date of deed,;
filed for record,; character of deed and remarks,
.....; book, page,
Note full fr. letter August 14, '78.

Records of Jefferson County show nothing except:

From John N. Rose this
to W. M. Goodrich 1721 Jan'y. 12, '71 quit claim cons. p. 1, book P, 253-4.
Verified by me as being all in the handwriting of Lucien Minor, one of the partners of H. M.
Trueheart & Co., of Galveston, Texas, who were agents for Wm. M. Goodrich.

MARY W. MONTGOMERY,
568 Park Avenue,
New York, N. Y.

November 7, 1912.
State of New York,
County of New York, ss:

Sworn to before me this 7th day of November, 1912, as an abstract of title in the handwriting of
Lucien Minor by Mary W. Montgomery.

(Seal)

F. A. JOHNSON, Notary Public No. 45,
New York County.

ABSTRACT OF TITLE.

From Deed Records of Hardin County as to 1721 acres of land, Abstract No., situated in
Hardin County, Texas, and originally granted to Chas. A. Felder, part of league.
Examined and stated by
for Wm. Goodrich. 3151.

H. M. TRUEHEART & CO., Agents,
At Galveston, Texas.

From Whom	To Whom	No. Acres	Date of Deed	Filed for Record
John N. Rose Records of Hardin County show nothing.	Wm. M. Goodrich	1721	Jan'y. 12th, '71	Sept. 17, '78
BOOK 1	PAGE 5			

Verified by me as being all in the handwriting of Lucien Minor, one of the partners of H. M.
Trueheart, of Galveston, Texas, who were agents for Wm. M. Goodrich.

MARY W. MONTGOMERY,
568 Park Avenue,
New York, N. Y.

November 7, 1912.

Judge Kennerly: We object to the offer of the abstract of title because it is wholly irrelevant and immaterial to any issue in the case. If offered for the purpose of showing the opinion of any person as to the title, it is wholly irrelevant and inadmissible, and if offered as a circumstance to show claim, the date that the claim was asserted is not shown, and the further objection that if it is offered as a circumstance to show claim, it shows no assertion of claim, and the mere fact of a party having an abstract in his possession proves nothing on the question of claim.

The Court: I think that is a matter for the jury to say. I overrule the objection and admit the abstract, and also I tell the jury that nothing contained in the abstract must be taken by you as being a muniment of title for the plaintiffs in this case. In other words, the plaintiffs' title to the land must not be proven by the abstract. The court does not admit it for the purpose of establishing title, but simply admits it as a circumstance to be considered by the jury, along with any other circumstances which have been or may be hereafter introduced in evidence as bearing on the question as to whether these plaintiffs or their ancestors in title made claim to the land in controversy.

Defendants except.

Judge Kennerly: We offer the fifth cross interrogatory to Mary W. Montgomery and the answer thereto on p. 210 of the printed record:

Fifth Cross Interrogatory:

It is a fact, is it not, that you have never paid any taxes on this land?

Answer:

I have not paid any taxes on this land.

Mr. Gordon: I read from p. 206 of the printed record, another deposition of Mary Montgomery taken November 8, 1912. I also read the cross examination on p. 208:

Seventh Direct Interrogatory:

Please state whether or not Mr. Goodrich during his lifetime and his heirs since his death, have asserted claim of ownership to the land deeded to Mr. Goodrich by Rose in the Felder league in Hardin County. If yes, state in what such assertion of claim or ownership consisted.

Answer:

He asserted it to his wife in my presence and to me personally, and to other visitors to the house in my presence. Under my father's directions I made a copy of the survey of the Felder league in Hardin County, Texas. I do not know where the map or deeds are.

Eighth Direct Interrogatory:

Please state whether or not Mr. Goodrich or his heirs ever employed agents in Texas or attorneys to represent said interests in said land, and if so, what agents or attorneys; answer fully giving the names of such persons, and when and where the business was entrusted to them, and what they did, if you know, in connection therewith.

Answer:

I do not know whether Mr. Goodrich had ever employed agents in Texas or attorneys to represent said interest in such land, except that I know my father employed agents to look after his Texas lands. The names of such agents whom I knew were Charles Fitz, William B. Denson, formerly of

Galveston, John N. Rose, H. M. Trueheart & Co. of Galveston, Texas. The latter were his agents in Texas for many years previous to and up to the time of his death.

In 1901 Mr. G. H. Pengarvis of Livingston, Texas, was employed as agent by the heirs of Mr. Goodrich, and all papers held for the estate of William M. Goodrich by Messrs. Trueheart were ordered transferred to Mr. Pengarvis.

Ninth Direct Interrogatory:

State any other facts which may be within your knowledge concerning said matter which would tend to be of benefit to either plaintiffs or defendants in said case, whether you have been specially interrogated concerning the same or not.

Answer:

I know my father claimed an interest in the land in Texas in the Felder league during his lifetime and up to the time of his death. I acted for my father as secretary in writing letters and copying documents which referred to this property. I have seen the deeds referred to in interrogatory No. 6, or copies of the same in my father's possession, but I do not know where those documents are, or what became of them except that I believe that those which were not sent by him to his Texas agents were destroyed by my mother after my father's death.

First Cross Interrogatory:

State the different places you have resided in during your lifetime, and how long you have resided in each place. It is a fact, is it not, that you are one of the plaintiffs, in this suit?

Answer:

I resided in Europe all my younger life up to 1869.

From 1869 to 1879 I resided in Poughkeepsie, New York. From 1879 to 1903 I resided in Flushing, L. I., N. Y. From 1903 to 1907 I resided in Poughkeepsie, N. Y., and since then I have lived in New York City. I am one of the plaintiffs in this action.

Second Cross Interrogatory:

If you have answered that certain papers in regard to the Charles A. Felder survey of land in Hardin County, Texas, have come into your possession, state how and from whom said papers came into your possession.

Please answer fully.

Answer:

No such papers have ever been in my possession.

Third Cross Interrogatory:

If in answer to direct interrogatory No. 6 you have answered that you have searched for certain deeds, therein mentioned, and if so, state that you failed to find such papers in reference to such papers as you failed to find, you are asked to state particularly and in detail each and every place you hunted for said papers, the name of each and every person you applied to for such papers, and what connection said person or persons you applied to for such papers had with the record title to the land in controversy herein, or what connection such person had with any person who had any connection with the record title to the land in controversy herein.

Answer:

As answered to the direct interrogatory I had reason to believe that the papers had been destroyed, and I have made no search for them, because I do not know where to look for them. I asked my husband, who after my father's death,

took charge of some of my father's papers, if he had any of those referred to in these interrogatories, and he told me he did not. I have heard my father talk to my mother about this property and claimed that it belonged to him. I know that he conducted voluminous correspondence with his agents in Texas with regard to this property. I have seen hundreds of letters relating to this property, which passed between my father and his agents. At my father's dictation I wrote letters to his agents relating to this property. He had an extensive correspondence with John N. Rose, extending over many years.

Fourth Cross Interrogatory:

If you have answered that Mr. Goodrich during his lifetime and his heirs since his death asserted claim or ownership to the land in controversy herein, state particularly and minutely every act done by Mr. Goodrich during his lifetime, and by his heirs since his death, which you regard as assertion of claim to said land. Do not content yourself with saying that he asserted claim, but go further and state what particular acts were done by him and by his heirs after his death towards asserting claim to said land.

(a) It is a fact, is it not, that neither Mr. Goodrich during his lifetime, nor any of his heirs since his death, have ever taken possession of the land deeded to Mr. Goodrich by Rose?

(b) It is a fact, is it not, that neither Mr. Goodrich during his lifetime, nor any of his heirs since his death, ever paid one cent of taxes on this land? If it is not a fact, attach each and every tax receipt which you have covering taxes paid on this land by Mr. Goodrich during his lifetime and by his heirs since his death to your answers to these interrogatories, marking same with your name for identification.

Answer:

(a) I do not know whether Mr. Goodrich ever took possession of the land deeded to him by Rose. I do not know whether the heirs have taken possession. They left this matter to their agents.

(b) I do not know whether Mr. Goodrich ever paid any taxes on this land. I have no tax receipt covering taxes paid by Mr. Goodrich on his land in Texas. Taxes were paid by his agents.

Fifth Cross Interrogatory:

It is a fact, is it not, that you have never paid any taxes on this land?

Answer:

I have not paid any taxes on this land.

Sixth Cross Interrogatory:

Attach to your answers to these interrogatories each and every letter that you have ever received from anyone in regard to this land, and each and every letter that has ever been received by any of the heirs of Mr. Goodrich in reference to this land, from any lawyer or from any other person. Please mark each of these letters with your name for purposes of identification, and if you refuse to attach these original letters, attach to your answers true and correct copies of each of such letters, marking each copy with your name for identification.

Judge Kennerly: We want to show that there is no answer to the sixth cross interrogatory. We want the record to show that the 6th cross interrogatory on p. 210 was not answered.

Mr. Gordon: She does answer the interrogatory and we read it now from the original deposition:

I have never received any letter from anyone in regard to this land from any lawyer or any other person. I know that none of the heirs ever received such letters.

Seventh Cross Interrogatory:

Please state whether any lawyer or any other person has ever come to see you or any of the other heirs of Mr. Goodrich in reference to this land, and if so, state the name of such lawyer or such other person, and state when and what was the substance of any conversation had between this lawyer and you, or between this lawyer and any other of the heirs of Mr. Goodrich in reference to this land. Please answer fully.

Answer:

No lawyer or any other person has ever been to see me, nor to the best of my knowledge any of the other heirs of Mr. Goodrich in reference to this land.

Eighth Cross Interrogatory:

If any portion of your answers in reference to the claim which was asserted by the heirs of Mr. Goodrich and by Mr. Goodrich in his lifetime to the land in the Felder league, deeded to Mr. Goodrich by Mr. Rose, is based on what has been told you by other persons, please indicate specifically what portion of your answer is based on what has been told you by other persons, and what portion of your answers is based on what you know of your own personal knowledge.

Answer:

My answer to the claims affected by this action are based upon conversations with my father, information given to me by him, and my recollection of the documents copied by me or

read aloud in my presence by him. All of the names referred to in the deeds in the direct interrogatories are familiar to me because of the fact that I heard them mentioned frequently by my father, or saw them set forth in the documents or surveys which I copied at my father's dictation.

Mr. Gordon: I also want to read the cross examination of the deposition to which is attached the abstract, p. 212 of the printed record. I also offer the third cross and answer and the fifth cross and answer on p. 214:

First Cross Interrogatory:

It is a fact, is it not, that you are one of the plaintiffs in this suit, and is it not further a fact that your deposition has been taken in this cause twice before this?

Answer:

I am one of the plaintiffs in this suit, and, to the best of my knowledge, my deposition has been taken in this suit but once.

Second Cross Interrogatory:

Why was it that your mother had your father's Texas papers burned after his death, if your father during his lifetime and your mother after his death, and his other heirs after his death were claiming the land in controversy herein?

(a) Did not your mother, and did not you and the other heirs of your father know that his Texas papers would probably be of value in asserting his claim to this land, and if so, why was it that your mother had the papers destroyed? Is it not a fact that she had these papers destroyed because she believed and because your father believed during his lifetime that he had no valid claim to this land, which he could substantiate, and that your mother had these papers destroyed be-

cause she believed they were so much rubbish and were in the way?

Answer:

The question of our claim to the land in controversy in this suit had not come up at the time my mother destroyed the large part of my father's Texas papers. My mother was tired of the mass of correspondence on Texas subjects. And in particular with the vast number of letters endorsed with the name of John N. Rose, which my father left behind at his death. No revenues were coming from Texas, and only taxes were being paid out. In a fit of exasperation she gathered at random, in a barrel, and caused to be burned as many of those papers as she could, to get rid of them. She burnt these papers on her own authority, and without consulting the heirs. This act of hers has caused the heirs much trouble through loss of papers in subsequent litigation concerning our Texas matters.

Third Cross Interrogatory:

When was the first time that you and the other heirs of Wm. M. Goodrich decided to institute a suit for the recovery of this land, and what was the moving cause of your instituting such suit? Were you or the other heirs of your father approached by anybody who desired to institute said suit, or were any letters written to you, or the other heirs of your father by any persons desiring to induce you to institute this suit? If so, attach to your answers to these interrogatories all such letters received by you, or by the other heirs of your father relative to that matter. If you have not done so, please state why not.

Answer:

The bulk of my father's Texas property was sold in 1902.

We were aware that many outlying parcels to which he owned claims were still unsettled, and have waited until a convenient time should come for us to clear the matters up. We decided this at the inducement and instigation of no one.

Fourth Cross Interrogatory:

Please name all the persons who survived Wm. M. Goodrich at the time of his decease, and who claimed to be the heirs of said Wm. M. Goodrich, stating the date and the birth of each of such persons, and the date of the death of each of such persons if dead, and the present place of address of each of such persons who is now living. Please name all the children of the children of Wm. M. Goodrich, and state which of said children are descendants of deceased children of said Wm. M. Goodrich.

Answer:

Cornelia P., born in 1821, his widow, a life interest.

Cornelia G., born 1845, his daughter.

Annie Louise, born 1850, his daughter.

Mary W. Montgomery, born 1858, his daughter.

As under his will.

Katherine Bucalo, born about 1867, daughter of a deceased daughter, Katharine L. Lieck.

Cornelia P. is dead; died in 1901; Annie L. is dead; died in 1902. Cornelia G. is living in Brussels, Belgium.

Mary W. Montgomery is living in New York City.

Katharine Bucalo is living in Rome, Italy.

Under my father's will she had no title to any of his property.

Fifth Cross Interrogatory:

It is a fact, is it not, that Wm. M. Goodrich acquired

his claim to the land in controversy by deed from John N. Rose, dated January 12, 1871, forty-one years ago, and that the first active assertion of his claim to this land, as against adverse claimants, was when this suit was filed last year?

Answer:

Wm. M. Goodrich always claimed this land during his lifetime, and his heirs have continued to claim it since his death. They have used their earliest convenience to press their claim.

Judge Kennerly: I want to read the fourth cross interrogatory and answer on p. 214 of the printed record.

Judge Kennerly: We move to strike from the record and strike out of the case all the testimony as to the heirs and who are the heirs of William M. Goodrich under whom the plaintiffs in this case claim, because it now develops from the testimony of a daughter of William M. Goodrich that he left a will and the will is not now produced. I think the authorities are that where there is a will, you must produce the will. Where it is affirmatively shown that a deceased person left a will, then the will must be produced in order to recover the property.

The Court: Without either sustaining or overruling the objection, I invite you to present it again at the close of the case.

Judge Kennerly: We save the point.

Mr. Gordon: We offer the will of Anna Louise Goodrich, a certified copy duly authenticated from Polk County, Texas, p. 219 of the printed record:

"I, Annie Louise Goodrich, of Poughkeepsie, N. Y., being of sound mind and in possession of all my

faculties, do make, publish and declare this to be my last will and testament.

I hereby give and bequeath to my two sisters, Cornelia Griswold Goodrich and Mary Willie Montgomery, all my property which was left me by my father and mother, and also any to which I may become entitled by inheritance or otherwise to be held in trust by them for my nieces, Ellen and Margaret Montgomery, and my nephew, Edward L. Montgomery, Jr., and I appoint as my executor, Edward L. Montgomery, to act with my sisters in the settlement of my affairs.

In witness whereof I have hereunto set my hand and seal this 4th day of May, 1899.

ANNIE LOUISE GOODRICH.

Signed and declared by the above named testator as her last will and testament in the presence of us and each of us, who, at her request, in her presence, do sign our names hereto as witness this 4th day of May, 1899.

Signed by

FANNIE N. GRISWOLD, New Orleans, Louisiana.

ROSE VARNEY, Flushing, L. I.

This instrument was duly probated by a decree of the Surrogates Court of Dutchess County, in the City of Poughkeepsie, N. Y., on the 13th day of October, 1904."

Judge Kennerly: The only objection we have to the will is this: The evidence shows that William M. Goodrich, in whom it is claimed the title was at the time of his death, left a will and that will has not been produced, and we object to the offer of this will.

Objection overruled.

Defendants except.

Mr. Gordon offers in evidence the will of Wm. M. Goodrich from the abstract from Polk County.

Mr. Gordon offers in evidence the agreement on p. 226 of the printed record.

Judge Kennerly: We do not object to that because we have agreed that it shall not include the Morgan-Swain deed. I object to the will.

Mr. Gordon: We have a certified copy of the Goodrich will, and without delaying the matter, it is probated in Polk County, Texas, and we withdraw the offer of the will from the abstract.

Mr. Whitaker: We also claim under the deed and title papers offered by the plaintiffs as follows:

The grant to Charles A. Felder and the deed from Chas. A. Felder to John A. Veatch, the deed from John A. Veatch to James Morgan. We now offer in evidence certified copy of the will of James Morgan and its probate:

"State of Texas,
County of Harris, ss.

Be it remembered, That I, James Morgan, of the County and State aforesaid, being of sound and disposing mind, but aware of the uncertainty of life, do make and declare this my last will and testament, hereby revoking all others, and by this instrument to devise and bequeath all my estate, both personal and real in the following manner, to-wit:

V. I do hereby constitute and declare the children of Son Kosciusko Morgan and his wife, Carolina, to-wit: Fannie Belle, Charles, W. P., May, Maria, Ophelia, and Nellie Latham, and Ellen Lee, daughter

of my daughter, Ophelia Lee, my residuary legatees, and to them in equal shares I will devise and bequeath all my estate and property, both real and personal, wherever same may be after all just debts against my estate and expenses accruing in the settlement thereof shall have been paid and discharged.

VI. I hereby constitute and appoint George Ball, of Galveston County, and H. F. Gillette, of Harris County, both of the State of Texas, and my William N. H. Smith, of Murfreesborough, N. C., the executors of this my last will and testament (and to qualify without bond) with power jointly or either of them to do all such acts and things, to sell any property necessary for the liquidation of debts and to take all such steps and measures as may be necessary or expedient in the discharge or execution of the trust hereby reposed in them, and in payment and the discharge of all the provisions and bequests herein contained, and in the administration of the estate and property devised and disposed of by virtue of this testament. And finally it is my special desire that this last will and testament shall have been proven and recorded and an inventory and appraisement of my estate recorded in the Probate Court, neither such court nor any other shall have anything further to do with the administration of my estate, but my said executors, George Ball and H. F. Gillette, and W. N. H. Smith, or any of them, who shall qualify and act and shall have full control of my estate under the will without accountability to any judge or court, further than before expressed by the will.

In testimony whereof, I have hereunto signed my name and affixed my seal, using a scroll for seal, this the 18th day of July, one thousand eight hundred and sixty-five.

(Seal)

JAMES MORGAN.

Witnesses:

CHRISTOPHER ROBINSON.

ASHBEL SMITH.

WILLIAM SYMKINS."

(This will was duly probated in Harris County, Texas. April 30, 1866.)

Mr. Whitaker: We now read the testimony of DR. E. S. COX, p. 122 of the printed record:

Questioned by Mr. Whitaker:

Q. Where do you live? A. At Galveston.

Q. Are you acquainted with Mrs. Fannie M. Allen?

A. Yes, sir.

Q. Do you know when she was born, her age? A. She was born in 1849 or 1850. I am not sure which.

Q. Who did she marry? A. Harry L. Allen.

Q. When? A. June 13, 1866.

Q. Is he living or dead? A. He is dead.

Q. When did he die? A. He died in 1883.

Q. Did you know Mrs. Mary M. Steadman? A. Yes, sir.

Q. When was she born? A. May 2, 1857.

Q. Did she marry? A. She is a widow.

Q. Who did she marry? A. I believe Silas Steadman.

Q. When? A. January, 1889.

* Q. Is Mr. Steadman living or dead? A. He is dead.

Q. When did he die? A. In 1905.

Q. Do you know Mrs. Ophelia M. Cox? A. Yes, sir.

Q. When was she born? A. August 31, 1859.

Q. Did she ever marry? A. Yes, sir.

Q. Whom did she marry? A. My brother, L. L. Cox.

Q. When did she marry? A. September 3, 1884.

Q. Is Mr. Cox living or dead? A. He is still living.

Q. Where do they live? A. Frankfort, Ky.

Q. Were you acquainted with C. W. P. Morgan? A. Yes, sir.

Q. Is he living or dead? A. He is dead.

Q. When did he die? A. He died in the fall of 1891 or the spring of 1892, I don't remember which.

Q. When was Mr. C. W. P. Morgan born? A. In 1855.

Q. When did he die? A. In 1892, I think.

Q. Who is Nellie Craig? A. She was Nellie Morgan.

Q. When was she born? A. In 1864.

Q. Is she married or single? A. Married to H. H. Craig.

Q. When? A. In September, 1884.

Q. He is still living? A. Yes, sir.

Q. Maria Church, who was she? A. Maria Morgan.

Q. When was she born? A. In 1861.

Q. Did she ever marry? A. Yes, sir.

Q. Who did she marry? A. H. S. Church.

Q. Is he living or dead? A. Dead.

Q. When did he die? A. I can not state exactly when he died.

Q. I will ask you if these people are the people mentioned in Col. Morgan's will as his devisees? A. Yes, sir.

On cross examination the witness, E. S. Cox, testified as follows?

Q. How old was Fannie M. Allen when she married?

A. She was in her 17th year.

Q. She has never remarried since her husband died in 1883, has she? A. No, sir.

Q. How old was Mrs. Steadman when she married in 1889? A. She was born in '57 and married in 1889.

Q. Has she ever remarried since her husband died? A. No, sir.

Q. I believe you stated that the husband of Mrs. Ophelia L. Cox is still alive? A. Yes, sir.

Q. What was the relationship between Mrs. Fannie M. Allen, Mrs. Steadman and Mrs. Ophelia L. Cox, and James Morgan? A. James Morgan was the grandfather of those ladies.

Q. Were those three ladies sisters of Mrs. Ellen Lee Mason? A. No, sir; cousins.

Q. What was the relationship between C. W. P. Morgan and Mrs. Craig and Mrs. Church? A. He was a brother.

Q. Was C. W. P. Morgan a son of James Morgan or a grandson? A. He was a grandson.

Q. Where does C. W. P. Morgan, Mrs. Craig and Mrs. Church, live? A. Mr. Morgan and Mrs. Church are dead, and Mrs. Craig lives at Corpus Christi, Texas.

Mr. Kennerly: We object to the question at the bottom of p. 125.

Mr. Whitaker: We leave that out.

Mr. Whitaker: We offer now from the printed record in No. 1997, Houston Oil Co. of Texas *et al.* v. Uriah Pollard *et al.*, p. 141, the testimony of Mrs. Ellen Lee Mason, interrogatories on p. 141, answers on p. 149:

Int. 2nd:

It appears that James Morgan, by two deeds, one dated March 12, 1863, and the other October 7, 1865, signed by J. Morgan, conveyed to Ellen Lee by each an undivided one-half of 1850 acres of land, a part of the headright of C. A. Felder, referred to as then situated in Tyler County. Please state (a) What your maiden name was, and whether you are or are not the grantee named in said deeds and (b) what relation, if any, the grantor, James Morgan, was to you, and when he died, if dead, and when your father died, if dead, and when your mother died if dead, and whether or not you ever resided with him, James Morgan, and if so, during what period, and what his condition then was as to health, especially eyesight, and what care, if any, you had of him during that period, and (c) when you were married, if at all, and to whom and when, and whether your husband is living or dead, and if dead, when he died.

Judge Kennerly: We object to the interrogatory and the answer where inquiry is made as to the health and physical condition of James Morgan. It is immaterial, the condition of his health, here. There is no question of that kind here. It is on p. 149.

The Court: What is the purpose of the testimony.

Mr. Whitaker: Well, to show Mrs. Mason's relation to him and knowledge of matters relating to his business.

The Court: For the present I will sustain the objection.

Answer as read was as follows:

Answer to Int. 2:

(a) My maiden name was Ellen Lee. I am the grantee in said deeds. (b) James Morgan, the grantor in said deed, was my grandfather. He died during March, 1866. My father is dead; he died in January, 1861. My mother is dead; she died in March, 1846. I lived with the said James Morgan after the death of my father in 1861. I lived with him from 1861 to up to the time of his death in 1865. I was devoted to my grandfather, James Morgan, as he was to me; and I rendered him what services and care was required of me, and was his constant companion during the time I lived with him. (c) I was married on February 8th, 1866, to Chas. M. Mason. My husband died in December, 1894.

Mr. Whitaker: We want to offer in evidence the answers of the witness to the 23rd, 24 and 25th cross interrogatories found on p. 162 of the record in Cause No. 1997, Houston Oil Co. of Texas et. al v. Uriah Pollard et. al., interrogatories on p. 148 and answers on p. 162:

23rd Cross Interrogatory:

Is it not a fact that you know that your father had conveyed this land to W. B. Lee before he made a conveyance to you?

Answer to X Int. 23:

I know nothing of any such a conveyance either from my father to Lee or from my grandfather to Lee.

24th Cross Interrogatory:

State what you know about the Lee deed?

Answer to X Int. 24:

I have never heard of such a deed.

25th Cross Interrogatory:

Who was W. D. Lee?

Answer to X Int. 25:

W. D. Lee was my father.

Mr. Whitaker: We offer the deposition of Mrs. Ellen Lee Mason taken in this case. We do not offer the cross examination.

1.

State your name, age and place of residence.

To the First Direct Interrogatory she answers:

My name is Mrs. Ellen Lee Mason. Age 71. I reside in Kerrville, Texas.

2.

Were you ever acquainted with James Morgan? Were you related to him in any way? And if yea, how? Is James Morgan living or dead? If dead, when and where did he die?

To the Second Direct Interrogatory she answers:

Yes. He was my Grand-father. He is dead. He died at New Washington, Morgan's Point. In year, 1866.

3.

Please state if James Morgan left any child or children, or the descendants of any child or children surviving him; and if yea, state the name of each child he left surviving

him, and if any of his children died before he did, name them, and state if such child or children so dying left any child or children, and who they were, naming them. And if any child or children of James Morgan have died since his death, then state if such left surviving any child or children, naming them.

To the Third Direct Interrogatory she answers:

James Morgan did not leave any child or children surviving him; but left grand-children surviving him: The grand-children surviving James Morgan are as follows, viz:—myself, & James Morgan Lee. Koss Morgan, who died before his father, James Morgan.—left the following children surviving him: Viz:—Ophelia Morgan, May Morgan, Nellie Morgan, Chas. Morgan, Fannie Morgan and Myrah Morgan.

4.

Give the names of the daughters surviving James Morgan, and whether living or dead, and whether married or unmarried, when and to whom as near as you can, and whether their husbands are now living or dead.

To the Fourth Direct Interrogatory she answers:

My mother, Ophelia Morgan,—was the only daughter of James Morgan. She died before my grand-father, died. She is dead. She married Mr. William D. Lee, both her and her husband are dead.

5.

If you have stated that some of the children of James Morgan have died and that they left surviving children, whom you have named, then of the daughters state whether they

are married or unmarried, and if married, to whom married and when, and whether or not their husbands are now living or dead.

To the Fifth Direct Interrogatory she answers:

Fannie Morgan, married Harry Allen and has three children, and they are all married. I think Fannie Morgan married Harry Allen, in year 1866, but cannot recall the exact date. Mr. Harry Allen, is now dead. May Morgan, married a Mr. Steadman, and has two children. I cannot recall the date of May Morgan's marriage to Mr. Steadman. Mr. Steadman is dead.

Ophelia Morgan, married Lewis Cox, and has no children. Cannot recall date of her marriage to Mr. Cox. Mr. Lewis is living.

Myrrah Morgan, married Mr. Church, and has no children. Cannot recall the date of her marriage to Mr. Church. I do not know if Mr. Church is living or dead. She is dead.

Nellie Morgan, married Mr. Henry Craig, and has two children. I do not remember the date of her marriage to Mr. Hy. Craig. Mr. Craig is living.

6.

Who are Mrs. Fanny Allen, Mrs. Mary M. Steadman and Mrs. Louis L. Cox? Where do they live? Are they related to James Morgan? If yea, how, and if they are named as devisees in his will by what name were they called in his will?

To the Sixth Direct Interrogatory She Answers:

They are grandchildren of Col. James Morgan. Mrs. Fanny Allen, Mrs. May (or sometimes called Mary) H. Steadman, and Mrs. Lewis L. Cox, live in State of Kentucky.

Franklin County. They are related to James Morgan. They are grandchildren of James Morgan. I suppose they were named as devisees in James Morgan's will, under the name of Morgan. I cannot recall to memory just how the Will read in their behalf.

7.

Please state when Mrs. Fanny M. Allen was married and what was her maiden name, and to whom she was married. Is her husband living or dead and if dead, when did he die?

To the Seventh Direct Interrogatory She Answers:

I think Mrs. Fanny M. Allen, married in June, in year 1866, and her maiden name was Fanny Belle Morgan. She married Mr. Harry Allen. He is dead. He has been dead a number of years, cannot say just how long, nor when he died.

8.

Please state when Mrs. Mary M. Steadman was married and what was her maiden name, and to whom she was married? Is her husband living or dead, and if dead, when did he die?

To the Eighth Direct Interrogatory She Answers:

I do not know just when Mary M. Steadman married. Her maiden name was May Morgan. Her husband is not living, and I do not know when he died.

9.

Please state when Mrs. Louis L. Cox was married and what was her maiden name, and to whom was she married and what was her age at the time she was married? Is her husband living or dead, and if dead, when did he die?

To the Ninth Direct Interrogatory She Answers:

I do not know when Mrs. Lewis L. Cox married. Her maiden name was Ophelia Morgan. She married Lewis Cox. I do not remember her age at the time she married. Lewis Cox is living.

Judge Kennerly: We offer the fourth and fifth cross interrogatories and the answers thereto. We offer them only against the interveners, the heirs of James Morgan and not against the plaintiffs in this case:

Fourth Cross Interrogatory:

Is it not fact that you have never asserted any title to this land, and that none of the parties named above as interveners herein have ever asserted any title to this land, and that the other heirs of James Morgan have never asserted any title to this land, nor paid any taxes thereon until this suit was filed? You will understand that this suit involves a different tract out of said Charles A. Felder league from that which was litigated between you and the Houston Oil Company of Texas in the United States Circuit Court at Houston.

(a) If you have answered that this is not a fact, please state what was done by you and by interveners herein, and by the other heirs of James Morgan in reference to asserting claim to this land and paying taxes thereon prior to the filing of this suit, stating specifically each and everything that was done by you in that regard.

It appears from the Deed Records of Hardin County, Texas that on November 21, 1844 James Morgan conveyed the land in controversy herein, together with other land, to William W. Swain, which deed was filed for record May 20, 1856 in the Deed Records of Hardin County, Texas, and

has been duly recorded therein every since. It is a fact, is it not, that since executing and filing the above deed, that neither you nor any of the other heirs of your grandfather, nor the interveners herein have ever asserted any claim adverse or inconsistent to that deed until this suit was filed? If this is a fact, state why none of said parties asserted any claim to the land in controversy herein, and if it is not a fact, state what was done by you and by the interveners and the other heirs of James Morgan toward asserting a claim against the title which passed by the deed from James Morgan to Swain aforesaid.

To the Fourth Cross Interrogatory She Answers:

I do not know. I do not know if any taxes were ever paid before this suit was filed on land in question.

(a) I don't know what was done by the interveners, and other heirs of James Morgan in reference to asserting claim to this land and paying taxes thereon prior to filing of this suit. Nor do I know what was done in my behalf regarding the taxes and claim to said land. I do not know what was done in regard to asserting claim to land conveyed by James Morgan to William W. Swain, by myself nor by the other heirs.

Fifth Cross Interrogatory:

Is it not a fact that you have understood for many years, and that it is common repute in your family, and that you have been informed by the administrators of your grandfather, and have always understood since the estate of your grandfather was administered on, that his claim of title to the Felder league was barred by limitation in favor of George F. Moore. If this is not a fact, please state exactly what you have understood and exactly what you have been told in

reference to the title of your grandfather to this league being barred by limitation, and state who imparted such information to you, and when.

Fifth Cross Interrogatory She Answers:

No, I never heard of the Felder league being barred by limitation in favor of Geo. F. Moore. If I ever heard anything about the land being barred by limitation, it has been so long ago that I have forgotten.

Mr. Gordon: Before proceeding for the defendants, we want to offer in evidence an agreement between counsel on p. 638 of the printed record, whereby the plaintiffs and interveners adjust their differences among themselves, and have agreed that recovery on behalf of either plaintiffs or interveners shall inure to their joint benefit, one-half to the plaintiffs and one-half to the interveners.

Mr. Gordon: On the issue of damages alleged in the pleadings, we omitted to offer the deposition of MR. T. E. DANZIGER from the printed record. We only care to offer such portions of his testimony now as bear on the questions of the amount and value of the sand taken. It appears on pp. 538 and 540 of the printed record. We also offer the question at the top of p. 540, and the whole of p. 538 and the three first questions and answers on p. 540. That is all we offer now.

Q. Are you connected with the Texas Builders Supply Company? A. Yes, sir.

Q. What capacity? A. Secretary and treasurer.

Q. How long have you been so engaged? A. Since 1903.

Q. Your company is one of the defendants in this case?

A. Yes, sir.

Q. Did you ever have a contract with the Houston Oil Company for the purchase of sand at Fletcher, in Hardin County? A. Yes, sir.

Q. I will ask you if under that contract you have got out any sand, and, if so, how much?

Q. Now, I shall not ask you further back than September 1, 1910. I will ask you whether or not you took out any sand after September 1, 1910, and up to September 1, 1912? A. Yes, sir.

Q. Did you take it out by virtue of this contract? A. Yes, sir.

Q. I will ask you how many cars you took out?

The Court: Was the sand reported?

The Witness: Yes, sir.

The Court: Did you take more than you reported?

The Witness: No, sir.

The Court: Did you take less than you reported?

The Witness: No, sir; they ought to have the monthly reports as to the amount taken.

Q. From September 1, 1910, to September 1, 1912, how many cars were removed from the land? A. 905.

Q. According to your contract, what did that amount to? A. \$1286.00.

Q. Is that the actual amount you paid the Houston Oil Company for the sand you removed under this contract? A. Yes, sir.

Q. You paid that sum in good faith, did you? A. Yes, sir.

Q. What was the reasonable value of the sand at the time and place taken? A. \$1286.00.

Q. For the amount of sand taken out? A. Yes, sir.

Q. You have stated the number of cars? A. Yes, sir.

Judge Kennerly: In connection with the testimony of the plaintiffs and interveners through the witness Danzinger, we offer in evidence the contract between the Houston Oil Company of Texas, and the Texas Builders Supply Company, dated October 16, 1902, and a contract dated May 27, 1903, which contracts are found on pp. 544 to 548 of the printed record. This is offered as cross examination of the witness, and in connection with the testimony of said witness Danzinger, the defendants offer in evidence the reports made by Danzinger of the cars of sand taken from that sand pit during the period about which he testified, which reports were offered at the former trial, and they are found on pp. 559 to 586 inclusive of the printed record, said reports being offered on the question of limitation to show the quantity of sand taken during that period, and to show the use and enjoyment of that property by the Houston Oil Co. of Texas generally on the issue of limitation and all other issues on which it may be applicable against all parties to the suit.

"State of Texas,

County of Harris.

This contract this day made and entered into by and between the Houston Oil Company of Texas, a corporation duly organized and doing business under the laws of the State of Texas, hereinafter styled First Party, and Texas Builders Supply Company with headquarters at

Beaumont in Jefferson County, Texas, hereinafter styled Second Party, Witnesseth as follows, to-wit:

That whereas, First Party is the owner of a certain sand pit at the station of Fletcher in Hardin County, Texas, on the line of the Gulf, Beaumont & Kansas City Railway Company, said pit being known as Pit F, and is willing to sell sand out of said pit to Second Party, and Second Party is desirous of purchasing sand from said pit of First Party, under the terms of this contract:

Now therefore, the parties hereby agree between themselves as follows, to-wit:

1. First Party hereby agrees to sell to Second Party sand out of said pit F, at Two and 25/100 (\$2.25) Dollars for each coal car and One and 25/100 (\$1.25) Dollars for each flat car; and said sand shall be mined and loaded at the expense of Second Party.

2. Second Party shall take and pay for at least Fifty (\$50.00) Dollars worth of sand at the rates aforesaid for each month; and if during any month Second Party fails to load and haul as much as \$50.00 worth of sand at the rates aforesaid, Second Party shall nevertheless pay First Party the sum of \$50.00 on the 5th day of the following month; but in that event Second Party shall have the right to load and haul out during any succeeding month enough sand to cover the shortage of any preceding month; and it further provided that Second Party shall have the right to purchase, load and haul out from said sand Pit F as much sand as they may desire during the life of this contract; and any excess above \$50.00 worth at the rates aforesaid which Second Party may load and haul during any month, shall be paid for

not later than the 5th day of the next following month at the rates aforesaid.

3. It is understood that during the life of this contract Second Party shall have the exclusive right to load and haul sand out of said pit F with the exception that the Kirby Lumber Company has the concurrent right to haul all the sand from said Pit F which may be desired by said Kirby Lumber Company for its own use; and the Second Party hereby agrees that it will load and ship for the Kirby Lumber Company all sand it may desire for its own use from said pit F during the life of this contract and charge the Kirby Lumber Company therefore for loading and superintendency not exceeding \$4.00 per coal car and \$2.00 per flat car, or including cost of sand \$6.25 per coal car, and \$3.25 per flat car.

4. It is hereby expressly agreed that either party hereto may terminate this contract at any time by giving the other party thirty days' written notice.

In testimony whereof, witness the hands of the parties hereto in duplicate originals this the 16th day of October, A. D. 1902.

HOUSTON OIL COMPANY OF TEXAS,
Per F. A. HELBIG, Ass't Secy.
TEXAS BUILDERS SUPPLY COMPANY,
Per M. F. PARKER, Pres.

The State of Texas,
County of Harris.

This contract this day entered into and by and between the Houston Oil Company of Texas, hereinafter styled "Oil Company," and the Texas Builders Supply Company, hereinafter styled "Supply Company," represents that:

Whereas, The said Oil Company is the owner of a certain sand pit at the station of Fletcher, in Hardin County, Texas, on the line of the Gulf, Beaumont & Kansas City Railway Company, said sand pit being known as pit "F," and is willing to sell sand out of said pit to said Supply Company, and said Supply Company is desirous of purchasing sand from said pit from said Oil Company;

Now, therefore, The parties hereto agree between themselves as follows, to-wit:

First—The Oil Company hereby agrees to sell the Supply Company sand out of said pit "F" at the following rates for each coal car, viz.:

(a) Where fifty cars, or less, of sand is taken in any one month, one dollar and seventy-five cents per coal car.

(b) Where upwards of fifty cars in any month, to one hundred cars in any one month are taken, one dollar and sixty cents per car.

(c) Where upwards of one hundred cars are taken in any one month, to one hundred and fifty cars in any one month, one dollar and forty-five cents per car.

(d) Where upwards of one hundred and fifty cars are taken in any one month, to two hundred, one dollar and twenty-five cents per car.

(e) Where upwards of two hundred cars are taken in any one month, to two hundred and fifty, one dollar and fifteen cents per car.

(f) Where upwards of two hundred and fifty cars are taken in any one month, to three hundred cars, one dollar and five cents per car.

(g) Where upwards of three hundred cars are taken in any one month, one dollar per car.

Second—The said sand shall be mined and loaded at the expense of the Supply Company, the prices herein fixed to be paid the Oil Company being net to said company.

Third—Said Supply Company shall take and pay for at least fifty dollars (\$50.00) worth of sand at the aforesaid rates each month, and, if, during any month, the said Supply Company fails to load and haul as much as fifty dollars (\$50.00) worth of sand at the aforesaid rates, it shall, nevertheless pay the Oil Company the sum of fifty dollars (\$50.00) on the fifth day of the following month. But in that event said Supply Company shall have the right to load and haul out during any succeeding month the sand so paid for. The said Supply Company shall have the right to load and haul out from said sand pit as much sand as they may desire during the life of this contract, at the prices hereinbefore fixed. Payment for the sand loaded and hauled out shall be on or before the fifth day of the month following the month during which such sand is loaded and hauled out. During the life of this contract, said Supply Company shall have exclusive right to load and haul sand out of sand pit. The Supply Company shall furnish the Oil Company at the end of each month, or as soon thereafter as practicable, a statement from the Gulf, Beaumont & Kansas City Railway Company, showing the number of cars of sand shipped out by said Supply Company from said sand pit during such month.

Fourth—It is expressly agreed and understood that either party hereto may terminate this contract at any time by giving the other party thirty days' written notice. If the contract is so terminated by the Oil Company, the Supply Company shall, nevertheless have the right to take from said sand pit enough sand at the prices herein fixed to supply any contract which said Supply Company may have, previous to said notice, in good faith entered into for the sale of sand out of said sand pit. The contract heretofore entered into between the parties hereto, dated the sixteenth day of October, 1902, shall cease to be of any further force and effect from the date of execution of this contract. It is especially understood, however, that the said Supply Company shall fully comply with the terms of said contract of the said sixteenth day of October, 1902, and pay for all sand taken thereunder previous to the execution of this contract at the prices fixed in said contract of the said sixteenth day of October, 1902, whether the said sand has been taken by the Supply Company, or by others, during the life of said contract, of the said sixteenth day of October, 1902.

This contract executed in duplicate this, the twenty-seventh day of May, A. D. 1903.

HOUSTON OIL COMPANY OF TEXAS.

By THOS. H. FRANKLIN, Pres.

(Seal of Houston Oil Co.)

Attest: J. A. WHITAKER, Secretary.

TEXAS BUILDERS SUPPLY COMPANY,

By D. O. LIVELY, Pres.

(Seal of Texas Builders Supply Co.)

Attest: T. E. DANZIGER, Secretary."

Mr. Whitaker: Of course the reports are admissible as between Danzinger and the Houston Oil Co., but cannot affect the rights of the plaintiffs and interveners. We object to the reports as to the amount of sand taken as far as interveners are concerned, because the statements made by Danzinger in those reports could not affect our rights. Those are reports made to the Houston Oil Co. and can be used by them as against Danzinger, but not as against the plaintiffs and interveners. I want to know whether the gentleman offers the letter and communications?

Judge Kennerly: We do not offer anything except the reports of the Texas Builders Supply Co. to the Houston Oil Co.

Mr. Whitaker: We object to them as affecting the rights of the plaintiffs and interveners. They are hearsay.

The Court: Those reports are offered for the purpose of showing how much sand was taken from the sand pit. Is there any controversy as to how much sand was taken out, \$1286.00 worth of sand, 905 cars. Is that controverted?

Mr. Whitaker: I don't know whether they controvert it or not. We don't want them to controvert it unless they controvert it with proper evidence. My objection is this: There are certain reports here. Whether they are the reports sent in by Danzinger or not, I don't know, and whether they are all the reports I don't remember. I suppose they offer it for the purpose of showing the amount of sand.

The Court: Do you offer it for the purpose of showing that there was less than that number of cars taken?

Judge Kennerly: No, sir; we offer it to support our limitation.

The Court: You don't offer it to show that there was less than 905 cars, but offer it for the purpose of sustaining the issue of limitations?

Judge Kennerly: Yes, sir.

The Court: You propose to do that by reports from Danzinger to the Houston Oil Co.?

Judge Kennerly: Yes, sir.

The Court: I think on the issue of limitation, it would be hearsay.

Defendants except.

The Court: I want to call attention to one matter. Objection was made that a witness had testified to the fact that there was a will of William M. Goodrich. Do you mean to close the case without offering that.

Mr. Gordon: We have wired for a certified copy, and it will be here tomorrow.

Judge Kennerly: We offer the cross examination of Mr. Danzinger, beginning on p. 543 of the printed record. We also offer the next cross examination on p. 548 at the bottom of the page:

Q. When did your company first commence taking sand? A. October 16, 1902.

Q. That was your first contract? A. Yes, sir; I think we took out a few cars that month.

Q. There were several contracts entered into, all of which we have here? A. Yes, sir; three of them.

Q. Between your company and the Houston Oil Company? A. Yes, sir.

Q. Then your operations commenced under the Houston Oil Company for this sand under and by permission of

the Houston Oil Company as owner of the land under contract of October 16, 1902, and the other subsequent contracts you made? A. Yes, sir.

Q. You recognized them as the owners of the land and purchased the sand from them? A. Yes, sir; we have paid them every month since 1902.

Q. Since you commenced that contract with the Houston Oil Company do you know how many persons and concerns have purchased sand from the Pine Land Association there? A. I know nothing beyond the first contract we had with them.

Q. You know nothing beyond the connection with the Houston Oil Company? A. No, sir.

Q. Do you know approximately when the operations of the sand pit commenced by the Texas Pine Land Association? A. No, sir; I don't.

Q. Well, did you see any evidence of some sand having been taken from there at the time you went there in 1902? That is, did you see any evidence of sand having been excavated outside of the railroad right of way when you went there in 1902? A. Yes, sir; a small quantity.

Q. A barrel or two? A. I mean a small quantity as compared to 1,900 or 2,000 acres.

Q. Don't you know that that sand pit has been in operation from 1893 down to the time you became connected with it? A. No, sir; I don't know it.

Q. You say that they did have switches and spur tracks, but that some part of them was on the right of way? A. Yes, sir.

Q. Some part of them would have to be on the right of way? A. Yes, sir. It was not long after we took charge that I moved the track.

Q. What is the depth of that excavation in places there? A. It varies from 6 to 15 or 16 feet, it may be a foot or so more, but not very much; we have now passed through the deepest part of the hill.

Q. Have you been operating that sand pit continuously from 1902 up to the present time; since you have had a contract there have you been regularly taking sand from there under purchase from the Houston Oil Company? A. Yes, sir.

Q. You have had men employed there to load the cars for you? A. Yes, sir; sometimes none would be there.

Q. Who loaded the cars when there were no men there? A. Laborers.

Q. When ever cars were to be loaded, they were there? A. Yes, sir.

Q. How much time has there been when there was nobody around the premises that you can state positively? A. I can remember around Christmas when the employes would get off; I could almost tell when they were off by the number of cars we would get out. We would give them a vacation sometimes.

Q. They have lived there in the house all the time? A. Yes, sir; except a superstitious negro named Collins that we had there; he never did live in the house.

Q. The other employes that came after Collins, did occupy the house? A. Yes, sir; a house or tent.

Q. The tent was walled up on the sides? A. No, sir; it was a wall tent, but had no planks.

Q. The physical operation of the sand pit was going on all the time? A. Yes, sir; practically, I was paying for it.

Q. Well, during the period of time from 1902, when you took charge of it, up to the present time, with the exception of this suit, has anybody protested that you know of against the Houston Oil Company operating the sand pit or the sale of the sand to your company? A. I don't know anything about that.

Q. You were buying it for commercial purposes? A. Yes, sir.

Q. Buying it for so much a car? A. Yes, sir.

Q. You did your own loading? A. Yes, sir.

Q. And had it hauled out by the railroad company? A. Yes, sir.

Q. Was there spring water there, water at a spring for drinking purposes, prepared for drinking? A. It has not been prepared.

Q. Where did you get the water that you used around there? A. There is a spring there at the creek, but that spring is not a permanent thing. When the creek is down, they use the spring water. I don't know whether the spring is on this land or not; it is right at the edge of the creek.

Q. Neither of the two houses you speak of is on the railroad company's right of way? A. I don't think so.

Q. The tank of the railroad company is on the railroad company right of way? A. Yes, sir.

Q. How far does the track now enter the sand pit from the railroad track proper? A. About 1,000 feet.

Q. A thousand feet? A. Yes, sir. It runs along like the railroad and then goes out like a spur a thousand feet in length.

Q. Of course where it joins on to the railroad track it is bound to be on the right of way? A. Yes, sir; now because we have moved it, but in those days it run almost the same as the main line.

Q. You mean almost parallel with the main line? A. Yes, sir.

Q. You don't mean to say it run on the company's right of way? A. No, sir; I don't.

Q. The sand had all been taken off the railroad company's right of way? A. Yes, sir; I guess so.

Q. You have never taken any sand off the railroad company's right of way? A. No, sir; but the railroad has since I have there.

Mr. Lee: We desire to offer the evidence of the witness on p. 542 of the record near the top of the page:

Q. Was there any pump established there or near there? A. Yes, sir.

Q. Describe that and state who was running it, if anybody? A. When I first went up there a man named W. T. Carroll was living in the house off the right of way, and on the railroad's right of way was a water tank about 125 yards or so south and there was a pump and boiler and a pipe running down into the creek from which the railroad obtained water for the engine.

Q. Did Carroll state that he was the pumper for the railroad? A. I knew that. *

Q. How long did he stay there? A. I cannot tell when he went there; I know when he left.

Q. When was that? A. In 1903.

Q. What became of the house? A. It is still there.

Q. Who lives in that house now? A. I don't know whether the darkies are occupying that house or not. I think they are up in the new house I built there. I don't know whether any of them stay in the old house or not; it has been quite a while since I was there.

Q. That new house, when was that put there and where is that? A. I think it was built in January, 1906. Mr. Bumpstead, who is a witness here, built it.

Q. Has anybody been living there except in that pump house since you have been there? A. Well, in 1903, when Mr. Carroll left there, we employed a negro by the name of Collins, and he would not live in the house; he was a superstitious old negro, and I got a tent for him.

Q. What became of the house then? A. Nobody occupied the house.

Q. The negro lived in the tent? A. Yes, sir.

Q. How long did he continue to live in the tent? A. He must have lived there quite a while, for in the following January, in 1904, I sent him another tent.

Q. Who was living in the house at that time? A. Nobody.

Q. Anybody else living around there anywhere in that section on that side of the creek? A. No, sir; not that I saw except away up near Silsbee.

Mr. Gordon: We want to offer certain portions of the testimony of the witness on p. 540, beginning with the question, "It is a fact, isn't it, that you had no control over any portion of the Charles A. Felder league of land."

Judge Kennerly: To the question beginning as above we object for the reason that the contract offered in evidence

between the Builders Supply Company and the Houston Oil Company of Texas specifies what there shall be done, and he cannot offer evidence to vary that contract. It is in writing and speaks for itself.

Objection sustained.

Mr. Whitaker: I think the objection would be well taken in that view of it.

Mr. Gordon: On p. 541 we offer the first question and answer and several following relating to the spur track:

Q. When you went there in 1902 what did you find there, describe the situation? A. Well, the railroad put a spur there, and there was a bank of sand alongside this spur, I don't think the end of that spur—

Q. Give your best judgment about it? A. I am giving an estimate; I don't know how many feet it was over the railroad right-of-way. This spur was running along the main line off the right-of-way perhaps a few feet.

Q. You don't know whether or not it was off the right-of-way? A. No, sir; I don't, but it must have been.

Q. How close was it to the main track of the railroad? A. I presume about 75 or 80 feet from the main line; some of the spur, however, was still on the right-of-way. Naturally you would have to cross the right-of-way to get off.

Q. Go ahead and describe the situation? A. That is about all, there was a hole there.

Q. There was a hole? A. Yes, sir.

Q. A hole of sand? A. Yes, sir; all except a few feet of stripping on top.

Q. A few feet of stripping on top? A. Yes, sir. That is the part that would not be fit for building sand, it would be leaves and things of that kind.

Mr. Gordon: Now on p. 552, questions by Mr. Gordon on re-cross examination, we offer that:

Questioned by Mr. Gordon:

Q. This house is yours?

(Question withdrawn.)

Q. State the facts about it? A. One house was built in 1905 or 1906, Mr. Bumpstead built it; the first house was there when I took possession; I paid Mr. Carroll for it; he claimed it; he left there in March, 1903. He came back the following December and I paid him \$10.00 for the house.

Mr. Gordon: We offer the re-cross examination by Mr. Hightower:

Q. Did the Houston Oil Company ever consent to that or make you a deed to the house? A. No, sir.

Q. What is the reason you say you owned it? A. I paid for it.

Q. Mr. Carroll got what he could out of it? A. He said he built it.

Q. You never had any understanding with the Houston Oil Company that you owned it, did you? A. No, sir.

Judge Kennerly: We wish to further cross examine Mr. Danzinger, who is in court.

Mr. Gordon: If you put him on now, we submit he will be your witness.

T. E. DANZIGER, being called to the stand by Judge Kennerly, testified as follows:

Questioned by Judge Kennerly:

Q. You are the same Danziger who testified at the last trial of this case? A. Yes, sir.

Q. Your initials are T. E.? A. Yes, sir.

Q. What position, if any, do you hold with the Texas Builders Supply Co.? A. Secretary and Treasurer.

Q. How long have you held that position? A. Since 1903.

Q. The first of the year 1903? A. Yes, sir.

Q. Were you engaged with the company in 1902? A. Yes, sir.

Q. In what capacity? A. Bookkeeper.

Q. Do you know a gentleman named M. E. Parker?

A. Yes, sir.

Q. Was he engaged with the company? A. Yes, sir.

Q. There at the time you were? A. Yes, sir.

Q. Where is Mr. Parker now? A. I could not say.

Q. When did you last hear from him? A. It has been seven or eight years.

Q. During your connection with the Texas Builders Supply Company what have you had to do, if anything, with the taking of sand from what is known as Sand Pit F under a contract between the Houston Oil Company of Texas and the Texas Builders Supply Company; what have you had to do with the contract? A. Operating the sand pit.

Q. Giving your personal attention to that matter? A. Yes, sir; personal attention.

Q. That was from the time you began work with the Texas Builders Supply Co.? A. Yes, sir.

Q. When did you begin work for them? A. October, 1902.

Q. You have been giving personal attention to that matter since that time? A. Possibly with the exception of one or two months.

Q. I will ask you whether or not any reports were made by the Texas Builders Supply Company to the Houston Oil Company of Texas of the quantity of sand taken from that sand pit, and, if so, how often they were made? A. Monthly reports.

Q. Did or not those monthly reports represent the quantity of sand taken each month from that pit? A. Yes, sir.

Q. You were served with a subpoena duces tecum in this case to produce your books? A. Yes, sir.

Q. Have you your records showing the quantity of sand taken from that pit? A. Yes, sir; I have; I have a copy of each of those reports. They were sent in the form of a letter, and I think I have all our letter books and impressions.

Q. It will not be necessary to have those except the ones offered the last time, I have not been able to find them in the papers? A. You should have a copy of all of them.

Judge Kennerly: I will introduce those records a year at a time. To take one for each month would consume considerable time.

Mr. Gordon: I object to the introduction of evidence of these reports made by Mr. Danziger to the Houston Oil Co., of Texas, first, because counsel has already stated to the court that they are not offered for the purpose of showing any variation from the testimony already given by Mr. Danziger as to the number of cars actually shipped out and the time shipped and the value, and therefore no issue being tendered on that, the reports would be irrelevant and immaterial; second, because correspondence transmitting

the reports from Danziger to the Houston Oil Co., is hearsay insofar as it affects the plaintiffs and interveners in this case.

The Court: Do these reports represent the amount of sand taken out?

The Witness: Yes, sir; each month.

Objection overruled.

Plaintiffs and interveners except.

Q. I have made what purports to be reports for each of the months during the year 1909, and ask you to examine them. I will ask you if during the recess of the court you have examined the original letters of reports made by the Texas Builders Supply Company to the Houston Oil Company of Texas from October, 1902 up to the time of the filing of this suit as to the number of cars of sand moved each month? A. When was the time of the filing of the suit?

Q. Plaintiffs' petition was filed June 7, 1911, and the petition of intervention April 1, 1912? A. Yes, sir.

Q. You have? A. Yes, sir; I have.

Q. I will ask you now to give to the jury the number of cars removed during October, November and December, 1902, each month? A. October 10 cars, November 14 cars, December 23 cars.

Q. Now, turn to the year 1903, and give the number of cars taken and removed each month during 1903? A. January 25, February 20, March 10, April 20, May 25, June 21, July 19, August 43, September 25, October 26, November 11, December 6.

Q. Take the year 1904 and give each month? A. January 13, February 22, March nothing, April 28, May 25,

June 19, July 16, August 22, September 23, October 26, November 10, December 19.

Q. That was what year? A. 1904.

Q. Did you notice there that no sand was removed during the month of March? A. Yes, sir.

Q. Do you know why? A. No, sir; I don't remember. My records would show the reason why; I am under the impression that it was due to a bad track.

Q. A bad railroad track? A. Yes, sir.

Q. During that month did you not have your darkey, your negro, to move out of the house and move away, did you; I will ask you whether or not you removed any sand during the month of March, 1904? A. Those darkies were paid by the month, and in case they were going to be idle. I would bring them to town and let them work here.

Q. Would he go back out there? A. Yes, sir.

Q. How often? A. I could not state.

Q. Would he remove his things out of the house? A. No, sir.

Q. Did you have any machinery for loading the sand? A. No, sir; not at that time.

Q. Did you have any tools? A. Yes, sir; wheelbarrows and shovels.

Q. Did you remove them away? A. No, sir.

Q. Turn to the year 1905, and state the number of cars? A. January 5, February 10, March 18, April 15, May 38, June 35, July 25, August 27, September 9, October 15, November 12, December 10.

Q. There were no breaks in that year? A. No, sir.

Q. Give us 1906? A. January 8, February 21, March

26, April 38, May 35, June 19, July 20, August 15, September 15, October 16, November 7 December 16.

Q. Now give us 1907? A. January 27 February 18, March 19, April 17, May 15, June 19, July 24, August 13, September 2, October 18, November 8, December 11.

Q. Now the next year, 1908? A. January 39, February 41, March 21, April 15, May 21, June 21, July 12, August 11, September 15, October 16, November 20, December 5.

Q. Now, 1909? A. January 9, February 13, March 14, April 16, May 17, June 12, July 18, August 12, September 16, October 19, November 34, December 24.

Q. Now, 1910? A. January 14, February 22, March 30, April 24, May 38, June 36, July 56, August 61, September 53, October 48, November 50, December 49.

Q. Now, 1911? A. January 45, February 41, March 37, April 63, May 44, June 46, July 43, August 49, September 29, October 35, November 30, December 19.

Q. Now, the next year, 1912? A. January 24, February 30, March 36, April 37.

Q. That is up to the filing of the suit? A. Yes, sir. That is as far as you ask me to look. •

Judge Kennerly: We offer the original records in connection with the testimony of the witness, the reports made to the Houston Oil Co. of Texas, the amount of the sand and the times taken since they have been operating.

Q. These were the reports made at the time the sand was taken? A. Yes, sir; at the end of the month. I noticed in several cases I had omitted to send one or two months and would forward them later.

Mr. Gordon: We object to all this because it is uselessly encumbering the record with a mass of irrelevant matter, the substance of which the witness has given in his testi-

mony, and, in the second place, these reports are secondary evidence and hearsay. It does not prove anything.

The Court: I am of opinion that this in effect duplicates the testimony of the witness already given. I do not think the testimony is subject to the other objections you make, and I would not like to exclude it on the ground that it made the record too voluminous. If it becomes necessary to make up a bill I can control it.

Objections overruled.

Plaintiffs and interveners except.

Q. Mr. Danzinger, have you compared and examined the printed record used on the appeal of this case for the reports that were offered on the last trial of this case? *A.* Yes, sir; I have.

Q. Are those correctly copied in the printed record?

A. Yes, sir.

Judge Kennerly: Some of the reports are not here now. We offer them as contained in the printed record beginning on p. 559, and running down to p. 586. They were offered at the last term of court and have been misplaced in some way.

Mr. Gordon: We make the same objections to these as to the others.

Same ruling and same exceptions.

Note:—There are approximately 120 of these reports and same are omitted except the last one, which is as follows and which is in substantially the same form as the balance:

Beaumont, Texas, May 20th, 1912.

The Houston Oil Co.,
Houston, Texas.

Gentlemen:

Enclosed find our check for \$146.00, in payment of sand loaded out of Fletcher pit during the months of March and April, as follows:

H&TC	3114	IC	March 36 cars.	61362	IC	87324
SP	54055	PRR	115301 KCFS	82400	PRR	286740
C&EI	79367	NYC	278638 CRIP	86163	C&EI	13995
I&GN	1246	IC	350519 CRIP	184662	CRR	84570
		PRR	104929 CI&S		T&BV	620
CIS	184662	B&O	291280	64907	MOB	64456
H&TC	3258	StLSF	37740 CI&S	84570	MK&T	30213
PRR	292335	StLSF	82083 CRR	83173	MK&T	23389
Sou.	182967	MOG	74094 StLSF	183697	P&LE	41030
PRR	294655		3979 CI&S		StLIMS	20939
CI&S	12313	IC	April 37 cars.	4335	PL	799540
PRR	286740	AT	93386 B&O	79536	SM	180059
CGW	2531	AT	80380 AT	83653	AT	79352
AT	88789	ABA	80950 IC	69155	MKT	24869
AT	80853	MRR	50847 P&E	73678	PMcK	40729
M&O	11103	OCR	6063 KCFS	364	MOP	61657
AT	79788	LSMS	2539 HV	80950	AT	82179
B&O	147830	MK&T	35587 AT	11111	LSMS	57170
AT	80385	CB&Q	24072 CNO	6158	AT	81013
			217357 GC	AT	AT	83931

Yours very truly,

 TEXAS BUILDERS SUPPLY CO.
 T. E. DANZIGER, Sec'y.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. The carbon copies in use are copies of the originals received by you, are they, from the Houston Oil Company. Most of these carbons are addressed to the Builders Supply Company? A. They are just acknowledgments of our letters.

Judge Kennerly: I did not offer those.

Q. Now, I notice in your statement for the month of March, 1904, you never took any sand from the sand pit at all? A. Yes, sir; that is so.

Q. What was the negro's name you kept there at that time? A. Collins. I don't know whether it was Collins or one that came after Collins. I don't remember the year Collins left just now.

Q. Collins never did live in the house did he? A. No, sir.

Q. He just lived in a tent? A. Yes, sir.

Q. The tent did not have a floor? A. No, sir.

Q. If the owner of that land had gone up there, he would not have seen anything there but some shovels and spades, would he?

Judge Kennerly objects.

Q. If during the month of March the owner of the land had gone there, he would not have seen anything at that sand pit but some shovels, would he laying there not being used? A. Yes, sir; he would have seen some shovels and wheelbarrows.

Q. That is all to show a visible appropriation of the land? A. Yes, sir; the old shack was there.

Q. You did not tear that down? A. No, sir; that is still there.

Q. Was the tent the man lived in removed and brought to Beaumont during that time or just folded up?

Judge Kennerly: We object to that as leading and for the further reason that counsel has assumed that the negro did not stay on the land during that time; the witness has not testified to that; counsel has assumed that the negro left there, and the witness has not testified that.

Objection overruled.

Defendants except.

The Witness: The tent would be folded and placed in the house.

Q. And the negro was working around at your place in town? A. Yes, sir.

Q. During the next month, April, you did not get out any cars for some time did you, that is, along about the middle of the month? A. I could not say.

Judge Kennerly: We object to that as leading.

Objection overruled.

Defendants except.

Q. All right, go ahead. A. I could not state positively the date of the removal of each and every car during April, 1904; I can not do that. By referring to the records, I could not tell what date a car was loaded, I mean our records? A. My records.

Q. You mean the records of the Texas Builders' Supply Company? A. Yes, sir; we have a book called the telephone book. I don't know whether the 'phone was put in before this time. As far back as I remember the reports

would be gotten over the 'phone and entered on this book. I might tell from that what date we resumed loading.

Q. I will ask you when you leave the stand to see if you can obtain that book, and, if so, I can put you on the stand later, the date you removed the last car in February, 1904, and the date you removed the first car in April, 1904?

A. Yes, sir; I will look it up.

Q. See if you can find it and if it was Sim Collins who was there at that time? A. Yes, sir; I will bring the record with me; it is a small book.

Q. Where did you get all this sand for the G. C. & S. F. Ry. Co.? A. About 200 feet off the right of way of the Santa Fe.

Q. Which direction from the Santa Fe? A. West of it.

Q. How big a tract of land did the excavation cover prior to 1910? A. Not over an acre and a half.

Q. Not over an acre and a half? A. No, sir.

Q. I will ask you if it is not a fact that it was out of two different patches, one .94 of an acre and the other .14 of an acre? A. It was two different patches.

Q. Did you ever have that actually measured by a surveyor? A. Yes, sir.

Q. What was the name of the surveyor? A. Daniels.

Q. Did you show him the correct lines to measure the sand you took? A. Yes, sir.

Q. You commenced taking that sand next to the right of way, did you not; that is, just off the right of way? A. Yes, sir.

Q. And gradually kept encroaching to the west? A. Yes, sir.

Q. About how many acres of land are there in Sand Pit F at Fletcher?

Judge Kennerly: We object to that question. We do not object to his testifying how much he had excavated. If he undertakes to show the dimensions of Sand Pit F, the contract speaks for itself, and he can not vary from that.

The Court: The contract does not say how much is in Sand Pit F.

The Witness: The first contract is dated in 1902, and p. 544 of the record must be it.

Judge Kennerly: The court at New Orleans in passing on that question uses this language (Quoting it).

The Court: I think the testimony is admissible. I don't see anything in the opinion that militates against that. Objections overruled.

Defendants except.

Q. (question read to the witness) A. I would estimate that to be about six acres.

Q. About how much? A. About six acres.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. That old house you speak of is there yet? A. Yes, sir.

Q. That is the house nearest the railroad water tank? A. It is the first house going north.

Q. The first house going north on the railroad right of way after you cross the creek? A. Yes, sir; with the exception of a little pump house the Santa Fe has on its right of way.

Q. That house has been there ever since you knew the

place? A. Yes, sir; it was there when I first went up there.

Q. What was the size of Sand Pit F when you went there in 1902? A. How do you mean?

Q. You were asked the size of it now. What was its size then? A. I testified how much we took off and how much was there. Nobody has removed any sand but us.

Q. What was the size of Sand Pit F in 1902 when you went there? A. About eight acres.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. That is your estimate? A. Yes, sir.

Judge Kennerly: If I recollect correctly, the court held under advisement the question of the admission of the alleged deed from James Morgan to W. W. Swain. Is the court ready to rule on that question now?

The Court: That is the deed on p. 108 of the record?

Judge Kennerly: Yes, sir.

The Court: I will overrule the objections and let the deed go to the jury, with this explanation, gentlemen: At a former date of the trial the plaintiffs offered in evidence a certain deed from James Morgan to W. W. Swain. I will say that they offered a certain instrument purporting to be a deed from James Morgan to W. W. Swain, an instrument in writing purporting to be a deed, to which I have referred as an instrument which appears to have been certified by a man named Edward Hall, Commissioner of the State of Texas, and he certifies that it is a true copy of the original deed from Morgan to Swain, which he says was mailed and directed to the Clerk of the County Court of Tyler County

for record on the 21st of April, 1855, and not heard from since. That is the instrument which the court permits to go to the jury, and the court tells you that this instrument must not be understood or taken by the jury as a deed from Morgan to Swain, but it is simply allowed to be received by you as a circumstance to be considered by you for the purpose of determining whether in point of fact James Morgan deeded the land described in that instrument to Swain on the date of the purported instrument, that is, the 21st of April, 1844. In other words, gentlemen, the paper offered to the jury, which I have tried to describe to you, and which seems to have been recorded in Tyler County on the 22nd of May, 1856, is not to be taken by the jury in and of itself as evidence of the fact that the land described in that deed has been conveyed from Morgan to Swain, but the court submits to you as an issue of fact to be tried by you as to whether James Morgan ever made a deed to Swain, and that paper is to be received by you, not as a deed made by James Morgan to W. W. Swain, but the paper with its certificate is permitted to go to the jury, and the court will submit to you as an issue of fact as to whether James Morgan ever in fact made a deed to W. W. Swain. The instrument does not purport to be a deed but a copy of what Edward Hall said was a copy of a deed from James Morgan to W. W. Swain. You are to take this fact merely as a circumstance and give it such weight as you think proper to enable you to determine whether such original deed was made. It is simply a copy, and not the original, as Edward Hall says, of the original, but as to whether there was an original deed or not will be a question of fact which the jury must determine, and it will be submitted to you as a question of fact in the case whether

such original deed was made by James Morgan to William W. Swain.

Defendants except.

Judge Kennerly: I believe the court reserved some rulings on p. 99 of the record to the admissibility of the deed from Felder to Veatch.

The Court: No, sir; the ruling was on p. 184.

Mr. Gordon: That was the original deed on p. 99 of the record.

The Court: Yes, sir; I remember now.

Judge Kennerly: The objections are on p. 99; I think the court ruled on the second and third, but not on the first fourth and fifth.

The Court: I will submit that as an issue of fact to the jury; I will overrule the objections.

Defendants except.

Judge Kennerly: Did the court reserve something on p. 182 not ruled on?

The Court: No, sir; p. 184; I had already let that in; that is the deed from W. W. Swain to Robert Rose.

Judge Kennerly: I have a witness from Houston and want to put him on now out of order.

The Court: All right.

MR. JOHN HENRY KIRBY, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Your name is John H. Kirby? A. Yes, sir.

Q. Where do you live? A. At Houston.

Q. How long have you lived there? A. About 25 years.

Q. Where were you born? A. Up in Tyler County, the north end of Tyler County.

Q. How long did you live in Tyler County? A. Thirty years.

Q. What connection did you have with the Texas Pine Land Ass'n.? A. Well, I was their attorney and agent in Texas at first, and after the death of Major Harris, I-----

Q. What year did you begin as their attorney and agent? A. I think about 1889.

Q. What year did you become manager? A. In 1891, I think.

Q. Do you know where the Charles A. Felder league is situated? A. Yes, sir.

Q. I will ask you if you have been on that league of land? A. Yes, sir; many times.

Q. I will ask you whether or not the Texas Pine Land Ass'n. claimed that league of land? A. Yes, sir.

Q. For how long a time? A. From the date of their purchase; the title will show what date that was, about 1889, probably or 1890, maybe '91, I don't remember. It was from the date of their purchase up to the time they sold it in August, 1901.

Q. To whom did they sell? A. To the Houston Oil Co.

Q. Do you know who claimed that league of land prior to the time the Texas Pine Land Ass'n. claimed it? A. Yes, sir, I do.

Q. Who? A. John P. Irvin.

Q. Do you know who claimed that league of land prior to the time John P. Irvin claimed it? A. I think Word or Moore.

Q. The record shows that he purchased it in 1881 from George F. Moore and wife? A. Yes, sir.

Q. Do you know who claimed it previous to the time Irvin claimed it? A. Only from the records.

Q. Who was George F. Moore; did you know George F. Moore? A. No, sir; not personally; I knew him by reputation.

Q. Do you know what position he held in Texas?

Mr. Gordon objects as immaterial and irrelevant.

Objection overruled.

Plaintiffs except.

The Witness: He was Chief Justice of the Supreme Court of this State.

Q. Did you know T. J. Word? A. Yes, sir, I did; he lived at Palestine.

Q. Did you know the general reputation for honesty and fair dealing of T. J. Word in Texas? A. Yes, sir.

Q. Was it good or bad? A. Good.

Q. Do you know whether there was any connection or relation between Word and Judge Moore? A. I don't know to what extent, but I have an impression that Mr. Word was Judge Moore's son-in-law; I may be wrong about it. They were associated in land matters.

Q. Mr. Kirby did you have any connection with the G. B. & K. C. Railroad? A. Yes, sir; I was vice president and general manager.

Q. For what length of time; during what years? A. From the time it was chartered in 1893 until 1900.

Q. What became of that railroad? A. We sold the stock to the Santa Fe, and it was afterwards merged into the Santa Fe system.

Q. That is the railroad that runs to Rogan? A. Yes, sir; it is.

Q. Through Silsbee and Jasper? A. Yes, sir.

Q. I will ask you whether or not that railroad passes through the Charles A. Felder league? A. Yes, sir.

Q. Near what point, near what stream? A. It crosses Village Creek on the Felder league.

Q. Do you know where Fletcher or Sand Pit F is located on the Felder league? A. I know where the sand pit is and where Fletcher is, I don't know it as Sand Pit F.

Q. Where did that railroad start? A. At Beaumont.

Q. You built out north? A. Yes, sir.

Q. About what time did you cross Village Creek with it? A. Some time in the fall or winter of 1893.

Q. The fall or winter of 1893? A. Yes, sir.

Q. Do you know when and who first began taking sand from Sand Pit F that you speak of? A. I don't know anything about Sand Pit F.

Q. Well, the sand pit on the Felder league, north of Village Creek? A. Yes, sir.

Q. Do you know when the first sand was taken out of there? A. Yes, sir.

Q. When was that? A. Immediately following the laying of the track there in the fall or winter of 1893.

Q. 1893? A. Yes, sir.

Q. By whom? A. At first by the G. B. & K. C. through our superintendent, Mr. McNeeley.

Q. I will ask you whether or not there was any contract between that railroad and the Texas Pine Land Ass'n.?

A. Yes, sir; afterwards. The first sand we took there was

from the right of way, and when we used that up we made a contract with the Texas Pine Land Ass'n. at so much per car.

Mr. Gordon: Was that contract in writing?

The Witness: No, sir; I don't think there was any contract in writing. We had an understanding with the Texas Pine Land Association through Mr. Nelson, their auditor and one of the trustees who lived in Boston and who came to Texas once a year and sometimes oftener.

Questioned by Mr. Gordon:

Q. The understanding was with Mr. Nelson? A. Yes, sir.

Q. Who had the understanding? A. I did on behalf of the railroad company; I represented both concerns and could not contract with myself.

Q. There was an agreement with Mr. Nelson when he came down? A. Yes, sir, and there were probably letters at the time, I don't recollect, but no written contract.

Q. Was the contract evidenced in writing or verbal? A. My recollection is that it was a verbal understanding about the price, and also the rights of the railroad company while operating the sand pit, that is, while taking sand from the lease.

Questioned by Judge Kennerly:

Q. You say after you had taken the sand off the right-of-way, you made arrangements with the Texas Pine Land Ass'n. How long did it take to get the sand off the right-of-way? A. Two or three months. We had a gumbo district this side of Pine Island Bayou, and put enough sand there to fill the Neches River.

Q. Where did you get that sand? A. From sand pit at Village Creek.

Q. That was used to ballast the track from Beaumont north? A. Yes, sir, and some beyond the sand pit, and we used it to fill the yards here in Beaumont out beyond Calder Avenue.

Q. Do you mean by the yards the place the trains stopped? A. No, sir, we had machine shops and general yards out there for switching purposes.

Q. I will ask you whether or not the G. B & K. C. also sold sand for commercial purposes? A. Well, I don't remember exactly; I was not here all the time. Commercial sand was moving all the time, but whether the railroad sold it or the Texas Pine Land Ass'n, I don't know.

Q. How much a car did the railroad pay the Texas Pine Land Ass'n for the sand? A. That depended on who loaded it. I don't remember the figures; I don't remember what the figures were. I was in Boston a good deal of the time and in Houston and in Silsbee where we had a saw-mill. I know more about the movement of the sand business from the accounting between the two companies than otherwise. I don't know who loaded the cars; I don't know the details.

Q. Who loaded the cars? A. Well, they had different methods at different times. Sometimes Mr. Fortleberry with the employes loaded the cars and sometimes the G. B. & K. C. section hands loaded them, and sometimes the railroad had a steam shovel to load them.

Q. That commenced in 1893, how long did it continue? A. I think that relation ceased in August, 1901.

Q. The Houston Oil Co. sold sand out of there afterwards? A. I don't know the details about that.

Q. Up to August, 1901, sand was taken out? A. Yes, sir, the Houston Oil Co. was selling sand out of there as late as 1903; I don't know about since then.

Q. Was or not the operation of that sand-pit by the railroad for the purpose of ballasting the track and for commercial purposes continuous or not?

Mr. Gordon: I submit that that calls for the legal opinion and conclusion of the witness. He should be required to state the facts for each successive year.

The Court: I think that is the correct criterion—to give the facts as to the operation of that sand pit for each year from the time the operation began whether continuous or not.

Mr. Gordon: What you know of your own knowledge, Mr. Kirby?

The Witness: Yes, sir, I am quite positive that the sand-pit was in operation continuously from the time we got there until I ceased to be manager of the Texas Pine Land Ass'n. I don't think there was a month during that period that there were no accounts between the two companies for the removal of sand and also removal of sand for commercial purposes later.

Mr. Gordon: Is it not a fact that you do not personally know about that from observation on the ground, but that you are testifying from accounts that passed in the office?

The Witness: Yes, sir, that is true; I was not constantly on the ground.

Mr. Gordon: I move that the testimony be excluded insofar as it is based on anything except his personal knowledge of what occurred on the ground.

The Witness: I was not there during the hauling of the sand. I was not around the sand pit. I could tell from

physical observation that a great deal of sand had been taken, and from my monthly statement of account it appeared to go out currently all the time. I don't know whether it did or not.

Mr. Gordon: I object to that statement. That is a book-keeping proposition and the books would be the best evidence.

The Court: You can state any physical change you observed by showing how much work had been done previous to the time you went there, any physical observations of that kind you can state to the jury. If the witness was there and discovered that there was an excavation showing there was work done there, he can state any facts like that.

Mr. Gordon: I don't want this to go into the record in the shape it is owing to the court's ruling.

The Court: I exclude the statement that Mr. Kirby made as to the reports in reference to the matter; of course there would be better evidence than that.

Defendants except.

Q. You have stated that the G. B. & K. C. Railroad paid the Texas Pine Land Ass'n so much a car? A. Yes, sir, I did not say how much they paid for it by the car.

Q. Please state to the court the purpose at the beginning of 1893, and the periods for which they were made? A. They made them continuously. I could not tell the dates; the taking of the sand was continuous all the time.

Mr. Gordon: The statement of the witness is not, as he positively states, based on his personal knowledge of the taking of the sand there. I object to it.

The Court: I will overrule the objection. He can state that.

Q. You say that these payments were continuous? A. Yes, sir.

Q. Continuous from 1893 up to what time? A. August, 1901.

Q. How often were the payments made? A. Monthly.

Q. Do you know anything about the houses that are situated on the Felder league, and particularly the old house near the pump station. It is in testimony by a former witness that there is a house there, and that the house was occupied by a man named Carroll, a pumper for the railroad. Do you know anything about the building of the house? A. We had a house there; I don't know the details. We had permission to build a house there—that is, the railroad had permission from the Texas Pine Land Ass'n to build a house or houses there both in the matter of operating the pump and the sand pit as well as the piling and tie yard we had there at the point you call Fletcher.

Q. Thise house that the pumper lived in was built by permission of the Texas Pine Land Ass'n? A. Yes, sir.

Mr. Gordon: We object to counsel leading the witness.

The Witness: The house I speak of is the house in which the pumper lived. I don't remember who built the house, but I know there was a house there, and that we had permission from the Texas Pine Land Ass'n to build any improvements we wanted there. Of course when we got through, we could take them away.

Q. I will ask you whether or not any other use was made of the Felder league by the Texas Pine Land Ass'n or the railroad? A. The Texas Pine Land Ass'n cut the timber began cutting it in 1893, or 1894; they cut timber up to

1901; they cut timber up to the time they sold out and the Houston Oil Company cut some afterwards.

Mr. Gordon: You state that on your own knowledge—that they cut the timber off that land in 1893?

The Witness: I don't know whether it was 1893, or 1894, that it was first cut. I know I operated on it at different times. Of course the timber cut is not like the sand business. We cut it there for saw timber and later for ties, wood and piling.

Q. What was done with the timber or the ties or the wood cut there? A. It was hauled away over the G. B. & K. C. to Beaumont and delivered to the Reliance Lumber Co., sold to the Reliance Lumber Co. by the Texas Pine Land Ass'n.

Q. Where was it loaded? A. On the Felder league.

Q. Where was it loaded? A. It was split along the right-of-way, cut by Mr. Fortleberry on the right-of-way and loaded on the G. B. & K. C.

Q. Where was it loaded on the league? A. Along about Fletcher.

Q. What is the character of the soil on the Felder league as to being sand or otherwise? A. It is all sand, this end of it; it is all sand, the west end of it to the creek.

Q. How far does that sand extend away from the creek, I mean from the railroad? A. I have never surveyed it, probably a mile or two miles.

Q. What is the width of the sand, I mean north and south? A. It spreads all over the league practically; I don't know just where the north boundary line is, I judge it to be sand. The survey is sand; I judge that from the character of the timber.

Q. I will ask you whether or not at any time you had up the question of utilizing that sand? A. Yes, sir, we needed tonnage after we got the railroad there, and I sent some sand to St. Louis to have it analyzed with a view of getting a glass factory in there.

Q. What year was that? A. About '94.

Q. After the railroad was built? A. Yes, sir.

Q. I will ask you if you know of your own knowledge whether John P. Irvin ever cut any timber from the league?

A. Not of my own knowledge. There were some stumps there. I don't know whether he had it cut or not.

Q. During the time the Texas Pine Land Ass'n claimed it, state whether or not you ever heard any other person claim it or making any objection to your taking the sand or the timber? A. No, sir, I do not know that I knew anything about it until a claim by Ellen Lee Mason. I don't know whether that was before or after the Texas Pine Land Ass'n sold it. It was for a part of the league.

Q. Did you ever hear of this claim by Goodrich? A. No, sir.

Q. Did you have the title examined when the Texas Pine Land Ass'n purchased the land? A. Yes, sir.

Q. By whom? A. I examined it myself. Judge Fisher Lanier represented Irvin and I talked to him about it and I went to Kountze and looked into the title myself.

Q. Do you know whether Irvin had the title examined when he purchased the land? A. I don't know.

Q. I will ask you whether or not during the time the Texas Pine Land Ass'n claimed that land it did or not assess it for taxes? A. Yes, sir; every year.

Q. And paid the taxes? A. Yes, sr, I paid the taxes

for the Texas Pine Land Ass'n every year currently during the time they owned it.

Q. Did the Texas Pine Land Ass'n ever become delinquent in the payment of taxes? A. No, sir, not as far as I know.

Q. The records show that the Texas Pine Land Ass'n sold to the Houston Oil Co. about August, 1901; I will ask you to examine these papers and refresh your memory therefrom, and state whether or not the Texas Pine Land Ass'n in 1901, were paying the Felder league and if so, by whom? A. These drafts were made to cover the taxes and the drafts were paid by the Kirby Lumber Co. for the account of the Houston Oil Co.

Q. These drafts were for the taxes for the Texas Pine Land Ass'n including the Felder league for the year 1901? A. Yes, sir.

Q. Can you give the date of that payment by an examination of the drafts, I don't want to offer the drafts? A. Yes, sir. If you will give them back to me I can tell. It was in February.

Q. Give the date of the payment of the taxes? A. The drafts were drawn on the 29th of January at Kountze, one on the 28th and one on the 29th, and they were paid in Houston on the 31st.

Q. The Kirby Lumber Co. was reimbursed by whom? A. The Houston Oil Co.; they paid the taxes for the account of the Houston Oil Co. This appears to be for a part of the Danter or Hanter league, but no portion of the Felder league.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. What interest have you in this litigation? A. None.

Q. None at all? A. No, sir.

Q. What interest has your company in it? A. Well, I don't know that we have any. We have a contract with the Houston Oil Co. for its timber under which we pay five dollars a thousand which is more than it is worth. I don't know what interest we have; that is all; that is all whatever it is.

Q. Who constituted the Texas Pine Land Ass'n when it was organized? A. When it was first organized there were five or six gentlemen in Boston got together and organized it in the first instance.

Q. Who were they? A. Well, I could not tell you all of them. Lets see, Nath Silsbee, H. R. Fletcher, John H. Berry, Frank Peabody and Mr. Nelson.

Q. You had no connection with them when they organized that company? A. No, sir, I belong to the Texas & Louisiana Lumber Co. composed of about the same parties; We had three or four hundred stockholders in Massachusetts and Texas.

Q. This organization was simply a bunch of citizens which included yourself, and it has no corporate existence? A. It was a joint stock association, and was a corporation with three or four hundred stockholders ultimately.

Q. Scattered all through the United States? A. No, sir, in Massachusetts mostly.

Q. Were not some of them in Texas? A. Yes, sir, a few of them. I don't know but one; I was one, I don't know any others.

Q. Some of them lived in Ohio? A. No, sir, I think not; I don't recollect anybody in Ohio.

Q. Who has the books of that association? A. presume the Houston Oil Co. has.

Judge Kennerly. I have the minute book.

Q. This joint stock association had no corporate existence? A. No, sir.

Q. The title to the land was taken in the name of three trustees? A. Yes, sir.

Q. Who were they? A. The trustees were Major Harris, Frank Peabody and Thos. L. Nelson. I think the minutes would show.

Q. Were there different changes in the trustees? A. Yes, sir, there were some changes. After Major Harris died, Charley Button became a trustee, and then he went out and N. W. Jordan came in. I think those five were the only trustees.

Q. How was the business of that land company conducted? A. They did not have a seal.

Q. The trustees decided what they would do with the Texas affairs? A. Yes, sir, they had business meetings of the stockholders like a corporation, and the trustees did what they were authorized to do.

Q. When did you get into it? A. After its first organization, I was agent and attorney in Texas.

Q. You were a lawyer? A. Well, I had a license to practice law.

Q. Did you examine the title to this land when the trustees of the Texas Pine Land Ass'n took the deeds to it? A. Yes, sir.

Q. You passed the title as good? A. Yes, sir.

Q. You knew all about it from the record? A. Yes, sir, I think I did.

Q. Well, did you know that you were holding under a deed purporting to be made to William A. Daniel on the 10th of June, 1839 for a recited consideration of one thousand dollars, recorded in February, 1842, in Tyler County—Menard County, I believe; you know that, didn't you? A. I could not tell you. If it was a matter of record in Tyler County at the time I examined the title, I probably knew it. I could not tell you now.

Q. That is the chain of title? A. I don't know that that would suggest anything to me now.

Q. You know as much about the title to the land as you do about the sand, don't you? A. No, sir, I have not seen this title for twenty years or more.

Q. You knew, did you not, that your title was deraigned by a deed signed by William Daniel, his mark, dated February 5, 1855, wherein for a recited consideration of one hundred dollars, he bargains, sells, releases and quitclaims and transfers to Thos. J. Word three leagues of land, the William M. Bradley, the W. M. Cox and the Charles A. Felder leagues of land, and gives the warranty to warrant and forever defend all and singular the premises aforesaid unto the said Thos. J. Word, his heirs and assigns, against every person whomsoever claiming by through or under him, his heirs or assigns, but against no other claim of any kind whatsoever. You knew that was where your title came from? A. I could not tell you about that.

Q. Do you remember everything that you ever saw in the chain of title? A. No, sir, I can not sympathize with

you. I do not remember anything except that it came through Judge Moore.

Q. Did it not strike you as a little remarkable that a man in 1839 would pay a thousand dollars for one league of land, and then in 1855, after Texas had gone through all its changes and developed into a standard government, and the country had settled to some extent, it was sold by a quit-claim deed for three-fourths of a cent per acre? A. No, sir, I would not because the books were full of many cases like that.

Q. Where did you ever hear of one? A. You could buy a league of land in the early days for a song. You could trade a shot-gun or a pony for a league of land.

Q. Did not that situation strike you as a little unusual? A. I don't remember it.

Q. You do not remember anything about it? A. No, sir, I don't remember it now.

Q. You don't remember that he said he did not warrant it against any other claim of any kind whatsoever except against himself? A. They would take quit-claims in the early days as they do now. Some of my lawyer friends now remember a time when they did not follow the statute.

Q. Is it not a fact that your memory was more fresh about this matter when you were engaged in moving the sand from the land? A. No, sir, we moved the sand. It may hurt you, Judge, but we moved the sand.

Q. It did not hurt you a bit? A. I just don't see why you should reflect on my testimony is all.

Q. What I am asking you is legitimate cross examination. I will ask you if it is not a fact that your memory was more fresh then about your claim to this land than it is now?

A. No, sir, I don't know that I knew anything more about the title to the land then than I know now. I bought the land in good faith and went into possession of it, and I thought it was our land.

Q. You just did not pay any attention to the title papers?

A. Yes, sir, we did; we had good lawyers, Fisher Lanier and Carlysle Martin; I think I examined the title before I formed a partnership with Judge Lanier, I am not sure.

Q. You were removing the sand there to perfect a limitation title? A. No, sir, if that was the object, we would have built a house there and went into possession.

Q. You would have put a farmer there? A. No, sir, we would have enclosed it.

Q. On the fact that you took the sand from the top of the ground you base your limitation? A. No, sir, we would have done what our lawyer told us.

Q. You were the lawyer of the Texas Pine Land Ass'n?

A. No sir, Judge Lanier became our lawyer long before we took any sand.

Q. Were you not the attorney and agent of the Texas Pine Land Ass'n? A. No, sir, I was the manager.

Q. When did you cease to be the attorney and agent?

A. When I became manager I think in 1901.

Q. Where were you in the early spring of 1903? A.

I don't know without looking it up. I suppose I was in Texas. I might have been in Texas and might have been in New York. I met a gentleman in New York that made me a heap of trouble and kept me up there quite a while in 1903.

Q. That was Pat Calhoun? A. Yes sir.

Q. He kept you there several months? A. Yes sir.

Q. In 1903? A. Yes sir.

Q. I asked you about '93? A. That is not what you said.

Q. Well, 1893? I could not tell you without looking it up. I think I was in Beaumont.

Q. In Beaumont? A. Yes sir, in the early spring of 1893, I may have been in Boston. We made a contract with Downey Bros. I think about 1893.

Q. They commenced building the road then? A. Yes sir.

Q. When did they reach Village Creek? A. I could not tell you the date, I don't know.

Q. About what time? A. I should say some time that fall, 1893.

Q. Were you here at the time that was built to Village Creek? A. No sir, not all the time.

Q. Where were you? A. I was in Boston trying to get the money most of the time.

Q. When did you get across the creek to this sand pit? A. In my direct examination I stated in the fall or winter of 1893. In April, 1894, or perhaps March or May of 1894, Frank Peabody, the Chairman of the Pine Land Ass'n board of trustees went with me to Silsbee, and we went on the train within a mile of Silsbee, and went out there to locate that town, and we located it on the 1st of May, 1894.

Q. Was there any sand being worked up to that time? A. Yes sir, we had taken some sand there.

Q. You took it up the right-of-way to build the road? A. No sir, to ballast the road.

Q. Well, to ballast it? A. Yes, sir. We got the sand up on the side of the hill and rolled across there and went around the hill; we got very little sand on the right-of-way.

We could not dig a ditch there without the roadbed falling into it. The railroad was on a dump there rather than through a cut.

Q. Is it not a fact that when you crossed Village Creek you ran into a hill there, a sand hill, and that you dug through that hill and took the sand and built the dump and ballasted the railroad line up and down as you built it; you went through a cut of sand? A. I don't think there is any cut there.

Q. Didn't you cut through a hill of sand there? A. I don't think so; we trestled there; that is my recollection.

Q. How wide is the right-of-way? A. 100 feet.

Q. 50 feet on either side of the track? A. Yes, sir.

Q. You got to Silsbee and laid out the town of Silsbee the 1st of May, 1894? A. Yes, sir.

Q. Where were you the balance of that year? A. I could not tell you; I don't know.

Q. Were you there attending to the construction of that railroad yourself? A. No, sir.

Q. How often did you see it, Mr. Kirby? A. When I was in Texas I saw it constantly; I would go up the line every day; I did not have much business except the building of the railroad. A large part of the time I was in Boston, Mass.

Q. Were you ever in Boston after you laid out the town of Silsbee? A. I was seven years building the road; it was a big task for a country boy. I was back and forth between Boston and here.

Q. How long was the longest time you stayed in Boston at one time? A. Probably a month.

Q. Probably a month at a time? A. Yes, sir.

Q. You did not stay as long as three months at a time?

A. No sir.

Q. You would go away and stay away two or three weeks and then come back? A. Sometimes I would not have the price and would have to stay away longer.

Q. During that year, 1894, in taking the sand from there did they go off the right-of-way? A. They were off the right-of-way almost immediately.

Q. You say they did? A. Yes, sir.

Q. How far off the right-of-way did they go, and on which side? A. It was on the west side; the railroad runs north and south; it was on the west side; the hill was on the west side.

Q. Where were you in 1895? A. I would have to look and see, I don't know; I was here or in Boston; I had two business places.

Q. Where were you in 1896? A. The same thing.

Q. Where were you in 1897? A. The same condition.

Q. Where were you in 1898? A. The same thing, I would have to look it up to tell.

Q. Was it mostly Boston? A. No, sir.

Q. How much Boston and how much Beaumont and how much Houston? A. Two-thirds at Beaumont and one-third at Houston and Boston.

Q. Did you live in Beaumont? A. I lived in a wooden shack around here back of the Crosby House at Beaumont.

Q. Where were you in 1899? A. The same condition.

Q. Boston, Beaumont and Houston? A. Yes, sir.

Q. And in 1900? A. The same condition up to July when I sold the railroad to the Santa Fe.

Q. July, 1900? A. Yes, sir, and after that I did not have any more business in Boston and was in Texas most of the time.

Q. Is it not a fact that up to the time the railroad was sold in July, 1900, that it was being constantly extended north towards San Augustine? A. Yes, sir.

Q. And that the sand that was used by the railroad was loaded by Mr. Carroll, the old gentleman, from the main line of the railroad until there was a spur put in there running off along the right-of-way and extending out about eighty feet between there and the right-of-way? A. No doubt some sand was loaded on the main line before they put in the switch.

Q. Is it not a fact that practically all the sand was taken there up to the time you said it was loaded on to the cars on the main line? A. No sir, that spur had been in there seven years before I sold the line.

Q. How far did that spur extend from the right-of-way, the main line? A. I could not tell you, several hundred feet.

Q. Is it not a fact that it did not extend but eighty feet from the right-of-way? A. No sir. At any time you mean?

Q. No, sir, when you sold it? A. No, sir. That is not a fact.

Q. I speak about the width from the right-of-way of the railroad company at the end of the line? A. Yes, sir.

Q. Is it not a fact that it did not extend but eighty feet? A. No, sir.

Q. How far did it extend? A. Several hundred feet.

Q. Which way did it go? A. It ran nearly parallel to the main line; the spur ran from near the water tank on the west side of the track and ran nearly parallel to the track.

The Court: How far was the extremity of the spur from the main line of the railroad?

The Witness: I will say several hundred feet.

Q. Do you mean several hundred feet from where it

left the track? A. No, sir, I mean from the center of the right-of-way to the terminus of the spur.

Q. You are sure about that, are you? A. Yes, sir, I think so.

Q. Now, do you know or can you estimate how much sand had been removed when you sold the railroad, that is, in acreage? A. I could not tell you; the acreage is not much.

Q. Is it not a fact that it did not exceed three-quarters of an acre? A. I should think more than that. We cut the hill out to the pond a quarter of a mile from the water tank. I remember seeing cars off at the end of the track in the pond.

Q. That was taken out when Mr. Danziger went there in 1902? A. Yes, sir, constantly; it went a little further away and we had to raise the track. We did have at that period a track that was used to couple the cars; we took the steam shovel out of there, and that left a little stub track there for commercial sand largely.

Q. When was that? A. I don't remember the year, but within the period you speak of.

Q. Was that the one several hundred feet from the end? A. No, sir, that was a little track from the main line that went back to the one several hundred feet from the main line. I presume it was taken up.

Q. By whom? A. I don't know whether the Santa Fe or who did it. That was the condition at the time I sold out to the Santa Fe. The track was temporary. We pushed cars in there and laid 35 pound rails.

Q. It was taken up when you sold to the Santa Fe? A. No sir, I don't say that. The track was there when we sold to the Santa Fe. We did not keep that up because it was not necessary; there was a little side track maintained there.

Q. When did it get in the water? A. I could not say. It was probably 1899 or 1900.

Q. Maybe 1897? A. No, sir; not that early.

Q. 1898? A. Might have been, I could not say. On one occasion I remember seeing a car down in the water.

Q. Did that look to you as a lawyer to be the basis for limitations?

Mr. Kennerly objects.

(Question withdrawn.)

The Witness: It never occurred to me anything about limitations.

Q. Now, you say there was a spur that run off there towards that sand pit running towards the lake and right adjoining the right-of-way? A. I don't know what you mean by right adjoining.

Q. I have tried to define it to you. I will use this plat here to represent it. Now the straight heavy line is marked GC&SF Railroad; that is what we call the main line, and the right-of-way is 100 feet wide being 50 feet on either side of the main line, and then there is a heavy dotted line at the end of which is marked end of track. Now going on in the direction of the main railroad track you run into the pond.

Q. Does the railroad go to the edge of the pond?

A. Yes, sir, the railroad goes along the pond. We run along the right-of-way parallel with the railroad track. It bore off there something like you indicate. The railroad has a curve; it is not a straight line. This track on this plat appears to be straight, but that is not correct.

Q. You mean it does not begin to curve until it appears the pond? A. Yes, sir, approaches the pond.

Q. Is this the water tank? A. No, sir, it is the pump-er's house.

Q. It does not begin to curve for some distance after it leaves the water tank? A. Yes, sir, some distance.

Q. About how far, 200 yards? A. No, sir, not that far. 200 feet I should say; I would not want to testify to that.

Q. I will ask you if it is not a fact that the stub track you had that would hold a couple of cars, after the other had submerged in the pond there, if it is not a fact that that stub track did not extend beyond the right-of-way at its furthest end over 80 feet? A. Well, I could not tell you about that without examining it. I never measured it; there was a stub track next to the railroad track for a distance.

Q. The cars would back out on that? A. Yes, sir, but that had projected in there quite a long distance, and your plat there is not accurate at all according to my recollection.

Q. In what respect is it inaccurate? A. The spur track is not long enough, and you have not the right curve of the railroad track. I don't know just where that begins. It may be right, but at the present time I would not guess it to be. I do not think that represents the sand pit I testified about.

Q. The railroad has not been changed? A. I don't know, sir, the main line I don't suppose has.

Q. Now, Mr. Kirby, you state that up until 1900 you were in Boston a good part of your time each year? A. Yes, sir.

Q. You were not down here examining what was going on at the sand pit, were you? A. No, sir, except

when I went out there, I never stopped at the sand pit. After we got through cutting the timber, I would see from the train as we went by there, and probably I would go by on the hand-car and see it.

Q. You did not pay any attention to the sand pit? A. Yes, sir; every little bit of tonnage and revenue was worth something to us.

Q. You would not hazard an opinion as to how much in acreage was excavated, the quantity that was taken off the right-of-way on the west side of that railroad track at the time you sold out in July, 1900? A. No, sir; I don't know.

Q. You would not say it did not exceed three-quarters of an acre? A. Yes, sir; I am sure it did.

Q. How much? A. I will say it very substantially exceeded that.

Q. I want you to give your judgment about it, how large in acreage the pit was in 1900 taken from the right-of-way on the west side of the track, that is, outside of the right-of-way? A. I don't know exactly. I never examined it with a view to determining the area. I have a picture in my mind of the situation there.

Q. It is just a hole in the hill running along with the right-of-way there? A. No, sir; it went at right angles to the road, to the right-of-way. The only reason they did not pursue that the hill got too high and we went towards that glen pond.

Q. Wilson was the man who was actually on the ground running the railroad during the time you were at Boston? A. He was here on the ground and he was run-

ning from the constable most of the time to keep creditors from catching him.

Q. Nominally he was in charge of the property? A. No, sir. He was general manager; he had a title.

Q. He was general manager and it was he who was in immediate charge? A. I don't know what you are talking about charge of.

Q. Of this railroad? A. No, sir; I was the boss; I was general superintendent who run the railroad and Webb was dodging the sheriff.

Q. I will read you a little of Mr. Wilson's testimony from this record given on the former trial, and ask you if it is correct?

Judge Kennerly: We insist it is not proper to read the testimony of a witness who has not testified on this trial for the purpose of questioning this witness.

The Court: The jury will not take into consideration the fact that any witness testified to any fact on the former trial, and has not testified on this trial. I will exclude that.

Q. I will ask you if this is not a fact. The question asked Mr. Wilson is——

Judge Kennerly: We object to that.

The Court: That is not proper. You must not state what any other witness has testified on a former trial who has not testified here. The jury could not pass on what was stated by some other witness on some other trial.

Q. Now, let's find out, Mr. Kirby, if Mr. Wilson was here as assistant general manager and looking after this part of the business? A. Looking after what?

Q. This railroad and its operation? A. Yes, sir; under me.

Q. What part of it? A. Whatever part was assigned to him, the operation of trains and the construction and operation and maintenance of tracks and that kind of things was in the control of the general superintendent. Mr. Wilson was more a financial man than otherwise.

Q. You had two financial men running the business? A. I was bond peddler and Mr. Wilson had more to do with the office and accounts than the physical operation of the road.

Q. He knew more about it than you did? A. No, sir, I knew more about it than anybody; I made it my business to know.

Q. Is it not a fact that during the time that railroad was operated by you in connection with your own force and the force of your assistant general manager, Mr. Wilson, that sometimes there would be months that an average of 25 to 30 cars would be taken out of there in a week, and then skip two or three months? A. No, sir.

Q. That is not true? A. No, sir, I don't think so.

Q. That was not so while you were in Boston? A. I don't think so.

Q. Why? A. Because we had the most technical and most diligent auditor for the Texas Pine Land Ass'n in the world, and I remember having him speak of the sand, and if there had been no sand taken, he would have inquired about it the first period; there might have been times when commercial sand was not moved out of there each month.

Q. Is it not a fact that there were times when possibly 12 months elapsed when there would be no sand moved out of there? A. No, sir.

Q. That is not true? A. No, sir.

Q. You don't know what occurred while you were in

Boston? A. No, sir, I could not say; I could not tell what happened in detail; I know just what I have testified about, and I would know from the bills whether there was any sand moving or not.

Q. How many times did you see them moving sand out of there? A. I suppose 100 times, may be less; I had a saw-mill at Silsbee and was operating that mill there constantly.

Q. You never stopped to the sand pit? A. No, sir, I would pass and see cars there; we stopped there always to get water.

Q. Did you look out ahead and see them moving sand or look out behind? A. Coming this way you would look out from the car windows, and when the train was at the water tank I would be sitting opposite the sand pit.

Q. Was there anybody living there at the time? A. Yes, sir, there was a little shack on the hill.

Q. When was that? A. I don't remember; during this period.

Q. Is that little shack there now? A. I don't know.

Q. Where was it? A. Up on the hill.

Q. How far from the track? A. I don't know how far, 300 or 400 feet probably.

Q. What direction was that from the pump house? A. I should say west.

Q. West of the pump house? A. Yes, sir. It may have been northwest.

Q. How far? A. I don't know.

Q. Describe that house? A. I don't know; just a little plank shack out there. I never noticed it particularly.

Q. Who was living there? A. I don't know.

Q. You don't know? A. No, sir.

Q. When was it built? A. I could not tell; it was after the railroad was built.

Q. How long afterwards? A. I don't know.

Q. One year or seven years? A. I don't know; it was not seven years.

Q. Did you see it built? A. No, sir, I saw it after it was built; I may have seen the material on the ground before it was built.

Q. It was built before you sold the railroad? A. Yes, sir, the shack I speak about.

Q. When did you last see it? A. I don't know when I saw it last. I have not had any interest in years there. There has not been a house built there since then that I know of. I passed there a number of times, but did not look out of the car there. When I was interested there it was my business and duty to know what was going on there. I have nothing to do with that up there now, and I don't pay any attention to it and don't care anything about it.

Q. You said awhile ago that this sand extended a mile from this place? A. Yes, sir, it is a sandy surface, I don't know how deep it is. If you would look you would know too, if you know anything about timber.

Q. Are you just guessing about that? A. I am not guessing at it. I did not bore to test the sand and see how deep it is or anything of that kind. That Felder league is made up from washings from Village Creek in the last million years or so, and it is all sand.

Q. You have never investigated that to see? A. No, sir, I have never made any borings.

Q. Do you mean to say that this sand bed extends for

a mile east? A. I did not say beds, I said soil, the sandy soil.

Q. Did you walk over there to see? A. Yes, sir, I have been over it a number of times.

Q. To see how much sand was on it? A. No, sir, I did not think about how much sand was on it.

Q. To see how far it extended over the league? A. No, sir, judging by the character of the timber.

Q. Now, how far did you say it extends north from where it crosses the creek? A. It extends up to that pond.

Q. Up to the mill pond? A. No, sir, not up to the mill pond, up to the pond.

Q. You are sure of that? A. Yes, sir.

Q. How far does it skirt the pond going west? Clear to Village Creek? A. I don't know.

Q. I understood you to say that the west end of it was sand? A. Yes, sir.

Q. You still say that? A. Yes, sir, I think so; all I ever saw.

Q. Have you made an investigation to see? A. No, sir, not lately.

Q. Well, at any time? A. It is from observation.

Q. Is it not a fact that the sand up there does not exceed eight acres including the two acres that was excavated about the time it first commenced to be excavated?

Judge Kennerly: We make the same objections to that, the same objections we made awhile ago.

Objections overruled.

Defendants except.

The Witness: I have not observed the sand pit, and I could not tell you.

Q. Is that your judgment, not exceeding eight acres altogether? A. I don't know what it is. You may have sand there that covers eight acres, but the west end of the Felder league is sand.

Q. Are you as certain about that as the balance of your testimony? A. No, sir, I give you an estimate from my general knowledge of what the character of that land is.

Q. You went there and cut some timber off this land? A. Yes, sir.

Q. When did you commence cutting timber on the Felder? A. I think in the winter of 1893.

Q. How much did you cut? A. Well, I could not tell you how much.

Q. How long were you cutting on the Felder? A. Probably not over a year; it was saw timber. We were cutting the saw timber not exceeding a year and probably not that long. There was not a large quantity of the kind of timber we were cutting on the land. We were only cutting the river timber that would float, and we only got the superior trees.

Q. Is it not a fact that you were not there three months on the Felder? A. Yes, sir, may be so, the timber that was cut at that time. After then we cut ties and piling and wood for all the year up to the time we sold to the Houston Oil Co.

Q. As you would need piling and ties you would go on the Felder and cut it? A. Yes, sir, we cut wood as long as it was within a reasonable hauling distance. A wood yard was maintained there all the time.

Q. A wood yard? A. Yes, sir, engine wood for locomotives.

Q. The railroad would load wood for the locomotives there? A. Yes, sir. The railroad would buy the wood when stacked on their right-of-way.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. Mr. Kirby, where was the GB&KC to take sand there under the contract between it and the Texas Pine Land Ass'n? A. On the west side of the track; we could get it anywhere we chose; we always took it from the west side.

Q. You mean they could go any place they chose on the Felder league and get sand? A. Yes, sir.

Q. This wood you speak of, who received pay for that? A. The Texas Pine Land Ass'n; they got the stumpage, all stumpage on the west end of the Felder.

Q. You mean that part lying west of Village Creek? A. No, sir, up to Village Creek. I am not familiar with that part of it across the creek; I have never been on it more than once.

Q. Who was the superintendent of the GB&KC Railroad? A. McNeeley part of the time and Frank Aldridge part of the time.

Q. Where is Mr. Aldridge? A. He is dead.

Q. What years were they superintendents? A. I could not tell you that; I don't recollect definitely. I think Mr. Aldridge was superintendent under Wilson and McNeeley prior to that time.

Q. Do you know what became of the records of the railroad? A. I left them in the corporate office out here, and I don't know where they are now.

Q. You turned them over to the Santa Fe? A. No, sir, the officers they appointed to take charge of the GB&KC.

Q. This track that run out into the sand from the main line of the railroad, if I understand you correctly, that track was being shifted and moved to load the sand at the least expense? A. Yes, sir.

Q. Explain how that was? A. Well, of course the sand would slip and slide like that, and when we would get too far from the sand for convenient loading, the ties would be relaid and the track moved nearer the sand, and when the steam shovel was in there we laid the track and loaded it from both sides.

Q. I will ask you whether or not at any time within your knowledge from 1893 to the time you sold to the Santa Fe there was not a track there for the purpose of taking sand? A. No, sir, there was no time that I have any knowledge of that there was not a track there.

Q. What was the length of that track during that time? A. The track was long enough at times to hold 12 or 15 cars, and at other times the track would extend three or four car lengths out into the pit.

Q. Who has been claiming that land from the time of the deed from the Texas Pine Land Ass'n to the Houston Oil Company of Texas? A. The Houston Oil Co.

Q. You were asked about the trustees of the Texas Pine Land Ass'n; the deed from the Texas Pine Land Ass'n to the Houston Oil Co. of Texas shows who the trustees were? A. Yes, sir.

Q. Were they trustees in July, 1901? A. Yes, sir, they were.

Q. Is it not a fact that Mr. Peabody and Mr. Nelson were two of the first trustees? A. I think they were:

Q. The deed from J. P. Irvin to the Texas Pine Land

Ass'n shows that Nelson and Peabody were trustees at the time of the purchase and that is dated January 11, 1891?

A. Yes, sir.

Q. And Mr. Harris too? A. Yes, sir, I think so.

Q. Do you recollect when Mr. Harris died? A. It was in 1891 or 1892; I was under the impression that it was prior to 1891. Harris was President when we bought the land from Irvin. Irvin made the trade with Harris and Harris had me pass on the title.

Q. You were asked by counsel on cross examination something about some deeds from Felder to Daniels and Daniels to Word. I will ask you if you know at the time the title passed who the persons were that figured in the chain of title? A. Yes, sir, I figured out the chain of title.

Q. You knew that George F. Moore was one of the persons? A. Yes, sir.

Q. You knew that T. J. Word was another one of them? A. Yes, sir, I think so; whatever the facts were.

Q. You knew that Mr. Irvin had the title examined? A. Yes, sir, Irvin had owned the land for a number of years.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Did you know John A. Glenn? A. Yes, sir.

Q. What position does he hold with the Santa Fe? A. Division Superintendent.

Q. How long has he held that position? A. I don't know.

Q. Ever since you sold out? A. No, sir.

Q. Do you know F. J. Duff? A. Yes, sir.

Q. What is his position? A. I think he is an attorney. I don't know what his title is. He is an attorney in the employ of the Santa Fe.

Q. Did you ever have a conversation with those gentlemen in regard to the Santa Fe's use of that sand pit after the controversy arose between the Santa Fe and the Houston Oil Co. about some sand the Santa Fe took out of there?

A. Yes, sir, I think so.

Q. State the substance of the conversation? A. I remember the facts; I don't remember the conversation. When the Santa Fe built its road from Conroe or Cleveland into Silsbee, I donated the right-of-way through my land, and when they got into Silsbee in 1901 just prior to the sale they wanted to get sand from Fletcher with which to ballast the track from Silsbee west, and Mr. Ripley said he did not think they ought to pay for it; that they were building up the country and benefiting the land, etc., and I told him if he thought that way, I would try to get the consent of the Texas Pine Land Ass'n about tonnage and taking the sand for ballast. I don't know how much of that sand the Santa Fe used. I did speak to those interested. I did not think the Houston Oil Co. was under any obligation to donate it unless they wanted to. The contention did not arise until the Houston Oil Co. acquired the property.

Q. Did you not make this statement to them: That you had intended, according to your promise to Mr. Ripley, to transfer the exclusive right to the Santa Fe of that sand pit and had forgotten it when you came to make the transfer from the Texas Pine Land Ass'n to the Houston Oil Co.? A. No, sir; I would not have stated an untruth.

Q. You did not make an agreement like that? A. No, sir, I did not.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. You spoke about not knowing how much sand the Santa Fe got; you mean you don't know how much they got to ballast the track from Silsbee west? A. Yes, sir. My impression is that they got their sand at another place on Village eight or ten miles north of there.

F. E. HELBIG, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Where do you live? A. At Houston, Texas.

Q. Did you have any connection with the GB&KC Railroad? A. Yes, sir, I was auditor of the road, had charge of the book and accounts.

Q. For what length of time? A. My recollection is that I went there in the spring, I think about the beginning of April, 1896, and I think I quit there on the 1st of January, 1901, the 31st of December rather.

Q. The first of January of what year? A. 1901; in other words my engagement there ended on the 31st of December, 1900.

Q. Did you have any connection with the Texas Pine Land Ass'n? A. No, sir, not at that time.

Q. Do you know where what is known as the sand pit on the Felder league is situated at Fletcher, rather on Village Creek is located? A. Yes, sir, I know the sand pit.

Q. Immediately beyond the creek? A. Yes, sir.

Q. When did you first come to know that place? A. I had not been over there more than long enough to become familiar with the accounts and the records when I concluded to take a trip over the road to look at the physical conditions. On the first or second trip I found a steam shovel on the left side going out on the west side standing there in this sand pit. They had made an enormous inroad into this sand hill.

Q. What amount of sand had apparently been removed at that time? A. Well, I don't know much about it; it seemed quite a good deal; there was a good deal of water in that part of it close to the track. They had apparently dug very deep and a good deal of water had accumulated. The right-of-way was fifty feet on either side of the track, and according to my recollection it was at least as far again as that on the west side. I should say fully that much.

Q. Do you know who was engaged at the time you went there in taking the sand out? A. Well, the monthly reports came to me from several sources, Mr. W. W. Fortenberry had the contract.

Mr. Gordon: Don't state the contract.

The Witness: He had an agreement whereby he hauled out a good deal of sand for commercial purposes. He had a loading contract, I should have said. I got my reports from him and also from the section foreman. I was never present myself when it was loaded, but they made reports of the use of the sand.

Q. Did the railroad company pay anybody for the use of that sand? A. We made reports of the use of it. The reports came to me sometimes direct from those men as stated and sometimes indirect. As a matter of fact, they were primarily due to the superintendent, Mr. Aldridge in-

asmuch as he was working the force. They had to go to him for that reason. I acquired this knowledge because it had to go into the operating expenses, and Mr. Kirby had to have the information for the use and benefit of the people to whom the sand belonged, and we made that monthly, and the further reason that it was a part of the traffic that entered into our earnings, and for that reason all the information had to come to me as auditor naturally.

Q. You were auditor of the company? A. Yes, sir.

Q. Did the GB&KC pay any person for the sand taken from that pit? A. Only in wages to the loaders.

Q. Who claimed the place where the sand was loaded?

A. I never knew anything about the owners of that land; I know we used it freely.

Q. Who was Mr. Fortelberry representing? A. He was a contractor loading the sand for a stipulated price.

Q. You said some reports had to be made to the Texas Pine Land Ass'n? A. They were made upon Mr. Kirby's request; my general knowledge at that time and now is that——

Mr. Gordon: Don't testify to what you don't know personally.

The Witness: I can not say while I handled the Texas Pine Land Ass'n accounts prior to coming to Beaumont; I was not sufficiently acquainted with land titles to answer the question you ask. I can not do that.

Q. Did the Texas Pine Land Ass'n receive any pay for that land?

Mr. Gordon: We object to the question as leading.

Q. State whether or not the Texas Pine Land Ass'n—

The Court: I don't think the question was leading. I will overrule the objection.

Q. State whether or not the Texas Pine Land Ass'n received pay for the sand taken from that pit? A. I don't know of my own knowledge.

Q. Do you know anything about any payments made by the GB&KC to the Texas Pine Land Ass'n for the sand? A. I have no data at hand from which to refresh my memory about the matter; I think my old records would show all this in detail. I am reasonably satisfied——

Mr. Gordon: Don't state anything you don't know.

The Witness: I am reasonably sure that we took care of our end of the sand used, I don't remember now. We paid for the loading most certainly; I remember that because that was a part of my pay-roll.

Q. Did you pay Mr. Fortelberry? A. He was part and parcel of the pay roll; I know we paid him.

R. E. WALL, a witness for the defendants testified as follows:

Questioned by Mr. Lee:

Q. Your name is Mr. Bob Wall? A. Yes, sir.

Q. Where do you live? A. At Silsbee.

Q. How long have you lived there? A. The last time about 15 years.

Q. What is your age? A. 68.

Q. Did you ever work for the Texas Pine Land Ass'n?

A. Yes, sir.

Q. When? A. I went to work for them in 1895.

Q. You first began in September, 1895? A. Yes, sir.

Q. What was your work? A. I was woods foreman.

Q. In what part of the country did your duties as woods foreman cause you to look over or have in charge? A. I was with the logging department.

Q. You were engaged in the cutting of pine timber? A. Yes, sir, all outside work generally.

Q. At what place was the pine timber cut? A. North of the mill.

Q. North of the mill? A. Yes, sir.

Q. Do you know where the Charles A. Felder league is? A. Yes, sir.

Q. Where is it? A. On Village Creek.

Q. Do you know where the station of Fletcher is? A. Yes, sir.

Q. State whether or not the station of Fletcher is on the Felder league? A. Yes, sir.

Q. When did you first become acquainted with the Felder league? A. In 1895.

Q. When you first became acquainted with it there at the station of Fletcher, what was the condition of the league? A. There was a sand pit and water tank there.

Q. A water tank? A. Yes, sir.

Q. Any other buildings? A. Yes, sir.

Q. What were they? A. There was one little shack about 10x14 and one 8x10.

Q. Were they on the right-of-way? A. No, sir, off the right-of-way.

Q. Was the tank on the right-ofway? A. Yes, sir.

Q. Where were the other buildings? A. Northwest of the tank about 300 feet, may be 350.

Q. How far are the buildings from the right-of-way?

A. I suppose 40 or 50 feet from the right-of-way.

Q. Did you live at Fletcher then? A. No, sir, at Silsbee, my business there then was getting sand for the Texas Pine Land Ass'n.

Q. Were you at Fletcher then? A. Yes, sir, once every ten days or two weeks.

Q. How long did you work for the Texas Pine Land Ass'n? A. I went to work for them in September, 1895, and worked for them until 1899.

Q. About four years? A. No, sir, not that long, three years and eight months.

Q. At the time you quit working for the Texas Pine Land Ass'n, state whether or not any sand was being removed by the Texas Pine Land Ass'n from the sand pit at Fletcher, at the time you quit working? A. Yes, sir, it was used all the time.

Q. State whether or not sand had been removed continuously from the time when you first noticed sand being removed up to the time you quit working for the Texas Pine Land Ass'n? A. I could not tell you that.

Q. You don't know? A. No, sir, I don't know whether it was moved continuously or not.

Q. Were you familiar with the moving of the sand generally? A. I only moved out one cut.

Q. State to the jury about how often sand was removed from the sand pit during the time you were overseeing it? A. When I had it moved it was moved every ten days or two weeks.

Q. That was for the Texas Pine Land Ass'n? A. Yes, sir.

Q. Was anybody else moving it besides you? A. I would have a car loaded.

Q. About how many cars would you move? A. Generally about one or two most of the time; most of the time two.

Q. Every ten days? A. Yes, sir.

Mr. Gordon: We object to leading the witness.

Objection sustained.

Q. You moved the sand every ten days? A. Yes, sir.

Q. How did you move it? A. Moved it on flat cars.

Q. Who loaded it on the flat cars? A. The crews working down there; I don't remember the names of the crews now.

Q. Who was the crew working for? A. The Texas Pine Land Ass'n.

Q. Were you in charge of the crew? A. Yes, sir.

Q. You moved flat cars every ten days or two weeks?
A. Yes, sir. Whenever we needed them.

Q. State to the jury what on an average was the number of cars you would move every ten days, at each time you moved them? A. I don't understand you.

Q. State to the jury the number of cars you would move every ten days, how many cars you would move every ten days? A. Sometimes one and sometimes two; I don't know exactly, two sometimes and sometimes one, only as needed.

Q. For what purpose or purposes were you getting the sand and having it moved? A. Used it about the engines, sanding the track and building.

Q. Used it to put in the sand box on the locomotive?

A. Yes, sir.

Q. From what part of the sand pit did you get the sand?

A. On the west side of the track.

Q. On the right-of-way or off the right-of-way? A. Well, we loaded it with shovels.

Q. Did you get the sand from the right-of-way or off of it? A. Off the railroad right-of-way.

Q. I will ask you whether or not at the time you were getting sand anyone else was getting sand? A. Yes, sir.

Q. Who was it? A. For some time a couple of negroes loaded there, I suppose for Mr. Fortelberry; he was on the ground; he is dead now. He was then working for the G. B. & K. C. Railroad.

Q. From what part of the pit was he getting the sand?

A. From the same place I got it from; we used his track down there.

Q. You both used the same track? A. Yes, sir.

Q. Both of you got sand off from the right-of-way? A. Yes, sir.

Q. How far was the sand you were loading from the right-of-way? A. The first not very far, and the last year I reckon fifty or sixty feet from it.

Q. Do you know the quantity of sand Mr. Fortelberry got there? A. No, sir, I do not.

Q. What did he do with the sand? A. I don't know sir, he shipped it.

Q. Which way? A. I don't know.

Q. Did he get as much as you did? A. Yes, sir, he got more sand than I did.

Mr. Gordon: We object to that as hearsay. He said he did not know how much he got.

The Witness: I don't know exactly but I know he got more than we did; we got it once every ten days or two weeks.

Objection overruled.

Plaintiffs and interveners except.

Q. Could you give an estimate of the number of cars that Mr. Fortelberry would move every ten days? *A.* No, sir, I could not.

Q. I will ask you whether or not you kept a man at the sand pit loading cars all the time while you were foreman? *A.* No, sir; I did not. I did not keep them there all the time.

Q. I will ask you whether or not Mr. Fortelberry within your knowledge kept men at the sand pit loading cars?

Mr. Gordon objects as leading.

Objection overruled.

Plaintiffs and interveners except.

Q. Answer the question (question read to the witness)?
A. No, sir.

Q. What was your answer? *A.* No, sir.

Q. You don't know? *A.* No, sir; I don't know whether he kept them there all the time or not.

Q. You don't know? *A.* No, sir.

Q. How many men did you keep there loading cars when you were loading them? *A.* Six or eight and sometimes ten.

Q. Do you know how many Mr. Fortelberry had when he was loading cars? *A.* I only saw two there.

Q. About how long would it take two men to load a car of sand? A. I don't know, sir.

Q. You don't know? A. No, sir; I don't know.

Q. I believe you stated you had two men? A. No, sir; I had eight or ten men loading my cars; we would load and run back to Silsbee.

Q. How long did it take you to load a car? A. An hour and a half or two hours.

Q. What was the condition of those buildings when you first saw them there? A. They were small shacks.

Q. Were they new buildings in 1895? A. No, sir; they had been built two or three years.

Q. Was anybody living in them? A. Yes, sir; the negroes were living in them.

Q. How long did they live there? A. I could not tell you. They were there for a year, I don't know whether the same negroes; there were negroes there a year. There was one negro family there five or six months.

Q. Where did they move to? A. I don't know.

Q. Was the house then vacant after the negroes left it? A. I don't know sir; I never saw it vacant. I don't remember seeing it vacant.

Q. Do you mean to say that you never saw the house vacant? A. No, sir; I don't remember seeing it vacant.

Q. Do you remember seeing the house vacant from the time you went there in 1895 until you quit working for the Texas Pine Land Ass'n.? A. No, sir; I did not see it vacant.

Q. Was any timber cut off the Felder league? A. I never cut any or had any cut on it.

Q. You never had any cut on it? A. No, sir; I noticed a good many stumps there.

Q. Do you know who cut the timber? A. No, sir; I do not.

Q. Do you know what the people were doing who lived in those houses there in 1895 and '96, I mean from 1895 until 1899? A. The negroes living there were loading sand.

Q. Who for? A. W. W. Fortelberry.

Q. For whom was W. W. Fortelberry getting sand, do you know: who was he loading sand for? A. I don't know, sir, I suppose for the GB&KC road.

Mr. Gordon: Never mind your supposition.

Q. Do you know who claimed this land at the time you were there? A. No, sir; I don't.

Q. You don't know? A. No, sir; I know the Pine Land Ass'n., was claiming it.

Q. The Texas Pine Land Ass'n.? A. Yes, sir; they claimed the sand pit by the superintendent; he told me to go to the sand pit and get sand and load it.

Q. Did the negroes living in these houses have any farms? A. No, sir.

Q. Did they have any hogs? A. I saw chickens there and they may have had hogs; I don't remember about the hogs.

Q. You don't remember about any hogs or cattle? A. No, sir.

Q. Did they keep any horses there? A. I never saw any horses there.

Q. All the stock you saw was the chickens around

the house? A. Yes, sir; I saw the chickens around the place.

Q. Did you see women in the house? A. Yes, sir; a woman and two or three children there.

Q. Did you ever see any washing hanging out on the line? A. No, sir; I never paid any attention to that.

Q. Where did you go after you quit working for the Pine Land Ass'n.? A. To Liberty.

Q. Have you seen the land much since then? A. I have seen it in passing to Beaumont.

Q. At the times you were passing coming to Beaumont state whether or not you ever saw anybody there loading sand? A. I don't remember; I think I saw Mr. Carroll there.

Q. Which Mr. Carroll? A. I don't know his given name, the old man; he is the oldest man; I have just seen him in passing there, and it looked like he was superintending having the sand loaded. He would be there with a crew.

Q. Did you ever see Mr. Fortelberry at the sand pit? A. Yes, sir.

Q. How many times? A. I could not say; he used to go with us very often; he lived at Silsbee; he used to go on the engine; he went over there with us several times.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Now, most of this sand you got would be as you would need it to sand the track, it would be for the engines to carry? A. Yes, sir.

Q. Running over the rails? A. Yes, sir. We used it too for mortar and building at the mill at the time; building the foundations for the mill.

Q. How many engines did you have requiring this sand?

A. Three engines.

Q. Three engines? A. Yes, sir.

Q. What was the size of the sand box on each engine?

A. I could not say.

Q. How much sand would it hold? A. I could not tell.

Q. About a barrel? A. More than a barrel.

Q. Approximately a barrel? A. Yes, sir; I guess so.

Q. A barrel of sand carried on the engine would last about how long? A. Sometimes in wet weather it would not last a mile; they usually run out very often, and sometimes they would not use any sand at all.

Q. Frequently in dry times they would not use any sand at all? A. Yes, sir; every trip they used it climbing hills.

Q. Did you fill the sand box every day? A. Yes, sir; every morning, and generally, not every day, at noon.

Q. For the three engines? A. Yes, sir.

Q. What would be three barrels every day? A. I don't know; I guess so. I could not get right down to the actual amount.

Q. Do you know the size of a sand box on an engine?

A. No, sir; I do not; I never paid any attention to that at all. That was out of my line of business.

Q. It is not a very big place, is it? A. I could not tell you. You know more about it than I do; different sizes I guess.

Q. How many barrels of sand would these three engines use? A. I tell you I could not get at the exact amount of sand.

Q. Approximately, Mr. Wall, would you say five barrels for three engines a day? A. Yes, sir; at least that.

Q. How many barrels of sand would you haul at one car load? A. I could not tell you that; it depends on the size of the car; it would be guess work.

Q. Give us your best judgment about it? A. On a flat car I guess about 40 or 50 barrels.

Q. Did you not use a box car? A. No, sir; we could not use a box car.

Q. Did you use flat cars? A. Yes, sir; most of the time.

Q. You just run down there and got enough to last ten days or two weeks? A. Yes, sir.

Q. And sometimes three weeks or a month? A. No, sir; we would hardly ever wait two weeks; we usually went there every ten days.

Q. Would not two weeks be about the average? A. Yes, sir; I guess so. We used a good deal of sand for building.

Q. We will come to that directly. You would run down there with a couple of flat cars and take about a couple of hours to load them? A. No, sir; it would take about an hour and a half to load one flat car.

Q. Then it would take three hours to load two? A. Yes, sir.

Q. And you would run back with them? A. Yes, sir.

Q. You did not leave anybody there, did you? A. No, sir.

Q. So that about every two weeks you would run down there and spend about three hours loading the cars

and run them to Silsbee? A. Yes, sir; every ten days or two weeks.

Q. Now you say you also got some sand there to use in the foundation of the mill? A. Yes, sir.

Q. What year was that that the mill was built? A. The mill was built the same year I went there, 1895. They commenced it in a few days after I got there and taken charge.

Q. That was in September, 1895? A. Yes, sir.

Q. They commenced it a few days afterwards? A. Yes, sir.

Q. When did they finish the foundation of the mill? A. I don't recollect how long. That was out of my line of business.

Q. They had the foundation fixed by the 1st of February, did they not? A. I don't remember; I paid no attention to it.

Q. That was all they used the sand for? A. I don't know. I do not know when they finished the mill; I could not tell you the exact day they finished it. They were about six months building it.

Q. About six months? A. Yes, sir.

Q. That is what they used a part of the sand for? A. Yes, sir; mortar for the furnaces. They would use it when they had a furnace to build or one to repair, any repairs around there and they used it in making mortar and such things as that.

Q. You got this sand about 60 feet from the track, most of it? A. We got most of it over 60 feet.

Q. You did not go as far as 70 feet? A. Yes, sir; as far as that.

Q. You went that far away from the main line? A. Yes, sir.

Q. There were two or three tracks put in there? A. Two tracks there at different times, and they were often taken up and moved. They would move them over to the west side as they used the sand.

Q. They would take the tracks and move them towards Silsbee? A. Yes, sir; if they needed to. It would be owing to how many cars Mr. Fortelberry there. If they needed another track, he would put down more rails.

Q. The cars that you loaded mostly were from the main line? A. No, sir; I did not load any from the main line. They run on the spur.

Q. On the spur? A. Yes, sir.

Q. That was practically with the main line was it not? A. No, sir; not exactly.

Q. It run off a little to the west? A. Yes, sir; west of north.

Q. What track did you load on? A. We loaded on the Fortelberry track.

Q. What track did you load on in 1896? A. I could not tell you; there were two or three tracks there; we loaded on the west track I think. We would commence on the east side and work back west.

Q. Was it as far as 80 feet from the main line? A. Yes, sir.

Q. You think it was that far? A. Yes, sir; we loaded at least that far.

Q. Just about 80 feet from the main line? A. Yes, sir; at least 80 feet and may be further; I think it was over 80 feet at the widest point.

Q You think so? A. Yes, sir.

Q Would you say about 85 feet? A. Yes, sir; along there.

Q From the main line out to its widest point? A. Yes, sir.

Q That was 1896? A. Yes, sir.

Q In 1897 where did you load from? A. It was still further; it got a little further west every month or two.

Q Were you not going right up on the main line? A. They went up a certain distance.

Q They commenced on the right-of-way and worked on back west? A. Yes, sir. They got a good deal of sand there before I taken hold of it; they had been working there a year or two; that was close to the main line.

Q Were they getting the sand before you went there? A. Yes, sir; off the right-of-way near the main line.

Q What do you mean by off the right-of-way? A. It was away from the right-of-way; the right-of-way was supposed to be 50 feet on each side; it was away from the right-of-way.

Q How far had they gone off the right-of-way? A. I don't know, sir.

Q Is it not a fact that up to the time you left there in 1899 that the encroachment outside of the 100 feet right-of-way, did not include more than $\frac{3}{4}$ of a acre of land? A. Yes, sir; more than that.

Q It exceeded more than that, did it? A. Yes, sir.

Q How much more? A. A good deal more.

Q It is there to show? A. Yes, sir.

Q Did you say that it exceeded more than $\frac{3}{4}$ of an acre?

A. No, sir; I have never measured it, of course.

Q. Did it amount to as much as an acre of ground altogether outside of the right-of-way? A. Yes, sir; I think it would be as much as an acre of ground altogether.

Q. That run right along north with the railroad track?

A. No, sir; north and northwest.

Q. With the railroad track? A. Yes, sir; a good deal west of north.

Q. You say when you went there in 1895, there were two houses there? A. Yes, sir; two small shacks there right close together.

Q. Right close together? A. Yes, sir; not over 30 feet apart.

Q. Not over 30 feet apart? A. Yes, sir; I think I had dinner at one of them one day, and there were women and children there and they prepared dinner for me. I hired them one Sunday to get dinner for my crew. I run off the track, I had a wreck, I remember that. We had dinner there and I remember the chickens there.

Q. That is one of the houses you saw there? A. Yes, sir.

Q. It has been there all the time? A. Yes, sir.

Q. Don't you know that Mr. Tom Carroll built that house after the Galveston storm? A. No, sir. Mr. Carroll's house is north of that. It has been removed.

Q. Don't you know that when Mr. Tom Carroll went there in 1901 that there was no house anywhere in that part of the country? A. Yes, sir; there two shacks there when he went there. Yes, sir.

Q. And that is there yet, one of them there yet? A. Yes, sir.

Q. What became of the other? A. I don't know, sir.

Q. When did you see it last? A. I don't remember that. I paid no attention to it.

Q. Did you see them there in 1897? A. Yes, sir; it was there in 1897.

Q. Where was it in reference to the present shack? A. The small one sat right by the side of the large one.

Q. It was about 8 x 10? A. Yes, sir.

Q. Was there some one sleeping in it? A. Yes, sir; but I don't know who it was. I suppose it was a negro. I saw a bunk in it.

Q. You are talking about the pump house? A. No, sir; this was northwest of the pump house.

Q. How far northwest? A. 300 feet.

Q. How far was it from the other shack that is still there? A. 10 or 15 feet.

Q. Which direction? A. I don't remember exactly, but they were right close together.

Q. Which direction was the little one from the one still standing there? A. It is right south of it.

Q. The one standing there is the one you saw there in 1895? A. Yes, sir.

Q. You are sure of that? A. Yes, sir; pretty sure of it.

RE-DIRECT EXAMINATION.

Questioned by Mr. Kennerly:

Q. Do you know which house Mr. Carroll built? A. Mr. Carroll built the house right southwest of the two little shacks. I saw it in passing there.

Q. Did you tell Mr. Gordon that that house had been removed? A. No, sir; I was not working there when Mr. Carroll was there.

Q. The house that Carroll built is still there, is it not?

A. No, sir; I don't believe there is but one house there.

Q. Is the house you are talking about still there? A. Yes, sir; one of the houses.

Q. How far is it from the water tank? A. At least 300 feet and may be more.

Q. At least 300 feet in what direction? A. North-west.

Q. You are absolutely certain there were two houses there? A. Yes, sir.

Q. During the time you were there? A. Yes, sir.

Q. How deep down did they go with that sand; how much did you say had been taken out in 1895 when you went there? A. Pretty considerable, I could not say exactly. They were going out off the right-of-way.

Q. That were not going out on the right-of-way? A. No, sir.

Q. The land was off the right-of-way, away from the right-of-way? A. Yes, sir.

Q. How deep down did they go in getting the sand?

A. It would be owing to the height of the bank. As a general thing about 8 feet, as near as I can tell.

Q. In answer to Mr. Gordon you said when you would go down there to get sand you would not leave anybody there? A. I would not leave a car there; that is what I meant; I would go down there one day after sand and probably leave there the next day with sand; that is what I meant.

Questioned by Mr. Lee:

Q. Mr. Wall, what was about the length of that spur track? A. There were different lengths.

Q. When you first went there in 1895? A. About three or four flat cars; it would hold that many.

Q. What was the length when you left there in 1899? It was considerable longer.

Q. How many cars would it hold then? A. Well, I have seen as high as six or eight there at one time.

Q. Was the track level or sloping? A. It was sloping.

Q. After you passed out of the right-of-way was the track then level or sloping? A. I could not tell you about that. It was a gradual slope generally from the main line to the end of the switch.

Q. How many was the most loaded cars of sand that you saw there? A. Three and four and sometimes five. About that many, I don't remember exactly.

Judge Kennerly: In connection with the other proof, we wish to offer the evidence of MR. H. M. RICHTER, printed record p. 238. Let the record show that the witness was testifying in December, 1912.

Q. Where do you live? A. In Harris County.

Q. Who are you employed by? A. The Houston Oil Company.

Q. In what capacity? A. As land and tax commissioner.

Q. What are your duties as land and tax commissioner? A. Looking after tax matters and in charge of the title papers, contracts and all title papers of the company.

Q. All title papers are in your charge and under your supervision? A. Yes, sir.

Q. You have access to the files of the Houston Oil Company? A. Yes, sir.

Q. I will ask you if you were ever requested to make a search for an original deed from Charles A. Felder to William Daniels, dated June 10, 1839, purporting to convey the Felder league? A. Yes, sir.

Q. Who requested you to make that search? A. Hightower & Butler.

Q. What was done by you? A. Well, I looked through the title papers filed with the company where it was supposed to be and could not find it.

Q. If that instrument was in the possession of the company, would it be among the title paper files? A. Yes, sir.

Q. Did you make a thorough search in the title paper files? A. Yes, sir.

Q. You were unable to find the deed? A. Yes, sir.

Q. Did you apply to anybody else in the course of your search? A. Yes, sir; the Kirby Lumber Company and John H. Kirby's man, Mr. Ayres, who has charge of all his papers.

Q. What was your purpose? A. To search for that original deed.

Q. Do you know what become of the papers of the Texas Pine Land Association? A. They are in my custody at Houston.

Q. If this original deed has been in the possession of the Texas Pine Land Association it would now be in the

files of the Houston Oil Company? A. Yes, sir; we have the title papers of the Texas Pine Land Association.

Q. You were exhaustive in your search? A. Yes, sir.

Q. You did not find it among the papers of the Texas Pine Land Association or the Houston Oil Company or the Kirby Lumber Company or John H. Kirby? A. Yes, sir.

CROSS EXAMINATION.

Q. Did you apply to the heirs of the estate of William A. Daniel to see if they had this original deed? A. No, sir.

Q. Did you ever make any effort to locate the heirs of William A. Daniel to ascertain whether they had the original deed or not? A. No, sir.

Q. Neither did you apply to T. J. Word? A. No, sir.

Q. Or George F. Moore or his estate? A. No, sir.

Q. You then looked among the papers of the defendants in this case? A. Yes, sir; and among the papers of the Texas Pine Land Association, which we had there.

Q. You looked there? A. Yes, sir.

Q. And did not go any further back than that? A. No, sir.

RE-DIRECT EXAMINATION.

Q. Did you know any of the heirs of Thomas J. Word? A. Yes, sir; Horace Word, at Palestine.

Q. Have you ever been at his house? A. Yes, sir.

Q. He is a son of Thomas J. Word? A. Yes, sir. That is my understanding about the matter.

Q. Is it further your understanding that Mr. Horace

Word had all the papers of Mr. Thomas J. Word in his possession?

Q. Answer the question. A. (Question read to the witness.) Yes, sir.

Q. Did you apply to Mr. Horace Word?

Q. Did you apply to Mr. Horace Word for permission to search through the land papers of his father? A. Yes, sir; on three different occasions.

Q. How many times did you go to his house for that purpose? A. Three times.

Q. Who was with you on two occasions? A. Mr. Butler.

Q. State what was done when you went alone and on the two occasions when I went with you? A. I searched through his papers with reference to papers pertaining to the land in question.

Q. Did you at that time or anytime afterwards have a list of the land belonging to the Houston Oil Company? A. Yes, sir.

Q. State what was done on that occasion? A. We looked through every paper he had pertaining to the Oil Company's lands.

Q. Did we search through anything else? A. Yes, sir; letters and different papers he had there.

Q. How thorough a search was made at that time? A. We looked and searched through all the papers he had, and he stated they were all the papers his father left, and we looked through everything he had.

Q. How many papers did he have? A. Numbers of them.

Q. In the aggregate a bushel or a wagon load or how many? A. Several bushels, I guess.

Q. I will ask you whether or not we were able to find the original deed from Charles A. Felder to William A. Daniels? A. No, sir.

Q. I will ask you whether or not the Houston Oil Co., now has all the papers you saw at that time relating to the Oil Company's lands? A. Yes sir; they were turned over to us.

RE-CROSS EXAMINATION.

Q. That was at the time when the O. C. Nelson league litigation was up along prior to the institution of this suit?

A. I don't remember going there in connection with the Nelson. I think that was after the Nelson litigation was settled.

Q. How long afterwards was it? A. I went there in September, 1911, early in the month and I was there the latter part of the month, and then I was there during March of this year.

Q. Was not that with special reference to a suit pending here in the Federal Court a suit at Kountze in the District Court involving the O. C. Nelson survey of land against the Wm. B. Kimball claimants? A. My understanding is that the Kimball litigation was settled at that time. I did not go in connection with the Nelson.

Q. What suit was it? A. The suit involving the Harrison league; we had a contract with him to deliver all the papers he had that pertained to our leagues under his contract with us.

Q. You were not looking especially for the Felder

deed, were you? A. Yes, sir; everything that pertained to our lands, and that included the Felder.

Q. You were not looking with special reference to the Felder? A. Everything that pertained to our lands.

Judge Kennerly: We offer also p. 340 of the testimony of this witness.

The witness, H. M. RICHTER, being recalled, testified for the defendants as follows:

Q. I asked you yesterday about a search for an original deed from Charles A. Felder to William A. Daniels; were you also requested to make a search for an original deed from Charles A. Felder to Joshua Smith, and from William Daniels to T. J. Word, dated in 1855? A. Yes, sir.

Q. Did you make such search? A. Yes, sir.

Q. What was the result of the search? A. I was unable to find them.

Q. Did you make the same search that you did in reference to the original deed you testified about yesterday?

A. Yes, sir.

Q. At the same time and through the same sources?

A. Yes sir.

Judge Kennerly: We offer the printed record on p. 243, the testimony of Mr. Charles T. Butler given in December, 1912.

CHARLES T. BUTLER, a witness for the defendants, testified as follows:

I want to say that the Houston Oil Company acquired from Mr. Horace Word what purported to be all the land

papers of his father, T. J. Word, for the purpose of finding what papers he had relating to lands owned by the Houston Oil Company. I went to Palestine for that purpose three times, once by myself, and twice with Mr. Richter and looked through the papers, and Mr. Horace Word said they were all the papers his father had. I made a diligent search through those papers looking for any papers relating to lands owned by the Houston Oil Co., and I did not find this original deed and since I have obtained possession of those papers for the purpose of this trial, I have made a search for the deed from Felder to Daniels, looking particularly for that instrument among those papers, and have been unable to find it.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You were not looking for the Felder deed? A. No, sir; not especially, but for any and all papers pertaining to lands owned by the Houston Oil Co., and I had a list of all the company's lands, which was referred to in the course of the search, and we examined all the papers.

Mr. Kennerly: We wish to call the attention of the court to the affidavit of forgery contained on p. 44 of the printed record. I will let that remain in and also call the attention of the court to the affidavit of forgery contained on p. 42 of the record. That is the one I wanted to offer, but I will leave both of them in. It begins on p. 41 instead of p. 42, the affidavit of Mr. Butler.

(All the affidavits are on file among the papers in the cause.)

Judge Kennerly: The agreement beginning at the bottom of p. 226 of the printed record has been modified by the agreement of counsel so as to prohibit from the reading of the record in cause No. 1997, the deed from Morgan to Swain. We offer the agreement beginning with the bottom of p. 226 and ending on p. 227 of the printed record. We also offer the agreement beginning on p. 227 and ending on p. 228. We also offer the agreement on pp. 227 and 228, and also the agreement beginning on p. 228 and ending on p. 229, and the agreement beginning on p. 229 and ending on p. 230, also the agreement beginning on p. 230 and ending on p. 231; also the agreement beginning on p. 231 and ending on p. 232.

(NOTE—All these agreements are on file among the papers in this cause.)

Mr. Lee: We offer a part of the testimony of the witness HORACE WORD, beginning on p. 244 of the printed record.

Q. State your name to the jury? A. Horace Word.

Q. Where do you live? A. At Palestine, Texas.

Q. Who was your father? A. T. J. Word.

Q. How long have you lived at Palestine? A. Since 1855.

Q. How long did your father live there prior to his death? A. From 1855 until he died in 1890.

Q. How many children did your father have, Mr. Word? A. He had in all eight.

Q. Where did your father come from to Texas? A. Mississippi.

Q. How old a man was he when he came to Texas? He was about 50 years old.

Q. What was his occupation or profession? A. He was a lawyer.

Q. Was he a practicing attorney? A. Yes, sir.

Q. How long did he practice law after he came to Texas? A. Up until along somewhere in the seventies; I don't think he practiced after 1873 or 1874, somewhere along there.

Q. I will ask you if your father was a man who kept his papers carefully that he had in relation to land: did he preserve his papers? A. Yes, sir; he was careful with his papers.

Q. What became of his papers after his death? A. They came into my possession.

Q. What time did they come into your possession? A. Well, from time to time. He was living with my older brother at the time of his death, and his library and most of his papers were there, and from time to time they gradually came into my possession entirely.

Q. Until all of them had passed into your possession? A. Yes, sir.

Q. I ask you where those papers are at this time? A. They are in my possession.

Q. I will ask you whether you have ever been requested to make a search among the papers of your father in your possession for an original deed from Charles A. Felder to William Daniels dated June 10, 1839, purporting to convey the Felder league? A. Yes, sir.

Q. Who requested you to make that search? A. Hightower, Orgain & Butler.

Q. Did you make a search? A. Yes, sir.

Q. What was the result of that search, did you find the deed or not? A. No, sir, I did not.

Q. How careful and thorough a search did you make among your father's papers? A. I looked sufficiently to satisfy myself that it was not among his papers.

Q. I will ask you if in the last year or two you have parted with some of your father's land papers? A. Yes, sir.

Q. What went with them? A. This same firm, Hightower, Orgain & Butler, have most of them. Some of my attorneys have a few.

Q. What papers was it they required of you? A. For lands of which they had acquired the title coming through my father.

Q. The Houston Oil Co. had acquired the title? A. Yes, sir.

Q. I will ask you further if you were requested to make a search among your father's papers for an original deed from Wm. A. Daniel to your father, dated February 5, 1855? A. Yes, sir.

Q. Did you make the same character of search that you did as to the other deed? A. Yes, sir.

Q. Did you find that deed? A. No, sir.

Q. I will ask you further if you ever made a search through your father's papers for a deed from Charles A. Felder to Joshua Smith, dated in 1840, conveying the Felder league? A. Yes, sir.

Q. Did you find that deed? A. No, sir.

Q. You found none of the original papers I have asked you about? A. No, sir.

Q. What did your father do before he came to Texas, in Mississippi? A. He was a practicing attorney.

Q. Did he hold any official position in Mississippi? A. Yes, sir; he had been Land Commissioner for the Indians and the Federal Government, I think and had gone to congress.

Q. He had gone to congress from Mississippi? A. Yes, sir. He had also held local offices, but I don't remember just what.

Q. You know he had been in congress and had been Land Commissioner for the Indians? A. Yes, sir.

Q. What time was he in Congress? A. I am not sure, but I think it was along in the forties; I have not charged my memory especially with that.

The Court: Was he elected to congress at the same time Sargent S. Prentiss was in Mississippi?

The Witness: Yes, sir.

Mr. Gordon: We offer the cross examination of this witness on p. 247:

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Did you ever know a man named William A. Daniel or Daniels? A. No, sir.

Q. Did you ever try to locate such a man or his heirs? A. No, sir, not especially, I don't think.

Q. Did you know a blacksmith that lived at Chireno, Nacogdoches County, named Bill Daniels? A. No, sir.

Q. Did you know about that man lived at Chireno, Nacogdoches County, named Bill Daniels making a deed to your father in 1855?

Judge Kennerly: There is no proof that the person named made the deed. The question assumes a fact not in evidence and it is not admissible.

The Court: I will overrule the objection, and at the same time I will tell the jury that they must not take the question and the manner in which it is framed as evidence of anything. You must restrict your consideration of the evidence to the answers of the witness. The fact that the question comes in that form would not constitute evidence that they were the same persons unless proven by witnesses.

Defendants except.

A. No, sir, I do not.

Judge Kennerly: We make the same objection to the fourth question on p. 248.

Objection overruled.

Defendants except. Question and answer are as follows:

Q. Wherein Bill Daniels signed his name to a deed to T. J. Word in consideration of \$100.00 for three leagues of land, including the Charles A. Felder league; did you ever hear anything about that? A. No, sir. I have no personal knowledge of the transaction whatever.

Q. The deed is dated February 5, 1855? A. No, sir. I was only born in 1854.

Q. In this deed he signed his name "William Daniel, his mark"? A. No, sir, I don't remember about that.

Q. This deed recites that in consideration of the sum of one hundred dollars to me in hand paid by T. J. Word, the receipt of which is acknowledged, do bargain, sell, release and quitclaim and transfer to T. J. Word, his heirs and assigns, all the following leagues, tracts or parcels of land, lying and

being in the County of Tyler and State of Texas—that is to say, the Mark M. Bradley league of land. You never heard your father say anything about he happened to get the deed to those tracts? A. No, sir, I don't remember it.

Q. Or who this man William Daniel was? A. I don't remember hearing him mention the man or the transaction.

Q. Some members of your family still claim the Cox league? A. Yes, sir.

Q. Did you see this original deed here or were you here in the case of *Laura Tabor v. Houston Oil Company* four years ago? A. No, sir, I never attended any trial of that sort here.

Q. Your father obtained deeds to many thousands of acres of land all through East Texas, did he not? A. Yes, sir.

Q. Could you approximate about how many thousand acres he got? A. No, sir. I don't know specifically, but I think something like 25 or 30 leagues of land.

Q. 25 or 30 leagues? A. Yes, sir, I think so.

Q. Something over a hundred thousand acres of land? A. Yes, sir, something like that, I don't know just how much.

Mr. Lee: The defendants offer the re-direct examination of the witness on p. 249:

RE-DIRECT EXAMINATION.

Questioned by Mr. Butler:

Q. I will ask you if you knew your father's general reputation in the community in which he lived for honesty and uprightness? A. Yes, sir, I believe I did.

Q. What was his reputation, good or bad? A. He had

a good reputation for honesty and uprightness in his business transactions.

Mr. Gordon: I want to state that while we are attacking this deed, we do not attack the reputation of T. J. Word. I have always regarded him as a good man. I have never heard anybody question his reputation. I offer the whole of my statement contained in the record.

Judge Kennerly: We object to the balance of the statement because it is self-serving and irrelevant and immaterial.

The Court: The objection would be good if you had not offered a part of it. It is a rule of evidence that where one party offers a portion of a statement, the other party is entitled to the rest of it.

Mr. Lee: We withdraw the statement of Mr. Gordon read to the jury.

The Court: I will tell the jury that the statement offered concerning the reputation of T. J. Word and concerning his views of the matter has been withdrawn, and the jury must not consider it at all.

Judge Kennerly: We now offer from the printed record in the Pollard case, No. 1997, the deposition of T. J. Word p. 99.

Mr. Whitaker: The interveners object to that because it was a deposition taken in the United States Court at Houston to which these parties were not parties, and they are not bound by the statements of the witnesses in that case. It is not embraced in any written agreement to use the testimony here.

Mr. Lee: Is that objection for the interveners?

Mr. Whitaker: I mean it now for the interveners.

Mr. Gordon: We make the same objection.

Judge Kennerly: The agreement is on p. 226.

The Court: That does not conclude any legal objection to the testimony that you would be able to make if the witness were on the stand. I do not understand the agreement to preclude you from making objections to the admissibility of the testimony upon any ground not mentioned in the agreement. I will have to construe the agreement as to whether it permits the use of this testimony, subject to any legal objections that could be made. The agreement is on p. 226 of the record. It states the purpose of the agreement. It is made in order to facilitate the trial of the case, and it is agreed that upon the trial the plaintiffs or the defendants may read the evidence from the printed record in the United States Circuit Court of Appeals in Cause No. 1997, Houston Oil Co. of Texas et al. v. Uriah A. Pollard et al., subject to such objections as could be made had such evidence been originally offered in this case in the manner and form provided by law. I think under the agreement the testimony is admissible, and I will hear the testimony and permit either party to object.

(NOTE—These agreements are on file among the papers in this cause.)

Judge Kennerly: We don't want to deprive them of any objections to the admissibility of the testimony.

The Court: I will overrule the objections and permit the reading of the testimony from the record.

Exception.

Witness T. J. WORD'S said depositions were as follows:

Int. 1st:

Are you acquainted with a league of land in Hardin County known as the Felder league and originally granted to

Charles A. Felder? If so, in what part of said county is said league situated? On what stream does it lie? What other league does it join?

Answer to 1st Interrogatory:

I am acquainted with the league of land in Hardin County known as the Felder league, granted to Charles A. League. The said league of land is situated in the southern or south-eastern part of Hardin County, and is bounded on the east by the Neches River, south by the Van Meter league, I think, and the north by the D. C. Montgomery league and the west by the Big Alabama or Village Creek, and embraces on the east side of said creek, the ferry on the road from Town Bluff to Concord and was occupied in 1854 by one Hare &

Intg. 2nd:

When did you first learn the locality of said Felder league of land and state the facts and circumstances which induced or led to your knowledge of it?

Ans. to 2nd Int:

I became acquainted with the locality of the Charles A. Felder league of land in the latter part of the year 1854, in the month of November of that year. The circumstances that induced me to become acquainted with the locality of said league are these: On or about the 31st day of October, 1850, I then being a citizen of Mississippi, I met with Mary E. Brown the daughter and only heir of David Brown, deceased, at her uncle, John Smith, in Pantotoc County, Mississippi, and being induced by the said Smith, I joined him in the purchase from the said Mary C. Brown of her interest real and personal in the estate of her father, David Brown. In this purchase the Charles A. Felder league was included. In the fall of

1854, I employed surveyor A. N. B. Thompkins and hired hands, and accompanied them in person to hunt up and survey the lands, thus purchased of Miss Brown. She having before that date intermarried with W. B. Frazier, of Sabine or San Augustine, Thompkins commenced surveying at or near King Ratcliff's, about ten miles below Town Bluff on the Neches river and continued down the river surveying the leagues, and about the latter part of the month of November, 1854, we ended our work, and the Charles A. Felder league was the last league we designated and mapped. These are the circumstances which induced me and the means used to acquire a knowledge of the said league and its location.

Intg. 3rd:

Did you or did you not ever assert or claim any title or interest in said league of land? If you (did) state when how and from whom you acquired it and the facts and circumstances connected with your claim of title, and what considerations you gave for said league of land, if you have said that you purchased it.

Answer to 3rd Interrogatory:

I did as above stated assert a claim to the said league of land together with several other leagues, and I purchased in connection with John Smith as above stated from Mary E. Brown, now Mary E. Frazier. The purchase was made on 31st Oct. 1850, at and for the sum of six thousand dollars, all of which sum I paid myself to the said Mary E. Brown, now Mary E. Frazier. And the division of the lands between said Smith, myself the Felder league fell to me. When we were surveying out said lands as stated above we found some parties of the name I think of Hare, claiming some right to the ferry

on the big Alabama or Village Creek, but they relinquished their claim to me and I leased the ferry to them, subsequently one of the Ratcliff's managed and controlled the ferry, but set up to the land and recognized me as the owner and so with all the occupants of the place so far as I know up to the time I sold it. I found also that several other persons had deeds on record for the said league. R. O. Lusk had a deed for that league and others that I had bought as stated above. Also W. A. Daniels, but they claimed to hold the same as trustee for said David Brown, and I took deeds from them from Lusk on 5th Oct., 1885, and from Daniel on 5th February, 1855, for that league and others so held by them, some others also seemed to have some sort of claim. But all so far as met with them conveyed to me this is so far as I can recollect an answer to the third interrogatory.

Mr. Whitaker: Objects to the answer to the third interrogatory on p. 102 as to what the deed covered, because the deed itself would be the best evidence, and a man can not come in and state that he claims title to the land without the production of the deed.

Mr. Kennerly: We will withdraw that part of the answer for the present.

Mr. Whitaker: We object to that part of the answer in which he states that he had taken a conveyance from Lusk and from Daniels by a certain deed, on the ground that the deeds themselves would be the best evidence. We object to that part of the answer. This applies to the latter part of the answer to the third.

Judge Kennerly: We withdraw that part of the answer at this time.

The Court: In reading the answers to the fourth, omit the word "defendant."

Intg. 4th:

Did you ever sell said land, if so to whom, and when and for what consideration did you sell it, did you sell a divided or undivided interest in it? A. If undivided, how and when was it divided?

Answer to 4th Int:

I sold an undivided half interest in the Felder league and several other leagues to George F. Moore, on or about the 6th November, 1857, the consideration for all was about eighteen thousand dollars, which he paid me. Subsequently he directed me to make deed for the same to his wife, Mrs. Susan Moore, which I did, and afterwards about the 4th July, 1866, upon a division of our lands I conveyed the Felder league with others to Mrs. Susan Moore in consideration that she conveyed to me other lands, so we divided and this league fell to her.

Mr. Whitaker: We object to the answer to the fourth direct interrogatory because it traces the title by the oral evidence of the witness, and the deeds themselves would be the best evidence.

The Court: I am inclined to think the answer is subject to the objections, at least in part. I will let him read the answer.

Plaintiffs and interveners except.

The Court: At the same time I will tell the jury in my charge that this character of testimony would not establish title to the land. There must be a deed proved to have been executed. I do not allow it for the purpose of showing title. You would have to offer the deed of course.

Intg. 5th:

From the time you purchased said land and had it identified and placed upon the map in the surveyor's office of Tyler County until its final partition between yourself and your co-tenant in that and other lands in Hardin County under whose general management, supervision and oversight was said league of land first in your own behalf and subsequently on behalf of yourself and your co-tenant.

Ans. to 5th Interrogatory:

From the time I first purchased the land in 1850 up to the time I had the (land) identified and placed on the map in 1854, John Smith had the oversight of them. From November, 1854, up to the 4th July, 1866, when Mrs. Moore and myself divided and partitioned our lands all the lands were under my supervision and management. I visited them almost every year and sometimes two or three times, kept tenants on them, etc., first on my own account, and then for Mrs. Moore and myself up to the division.

Mr. Gordon objects to the last part of the last sentence to the answers to the fifth interrogatory because it is the statement of a legal conclusion or opinion, and he is not giving definite details of any fact. We object further because it does not show that he kept any tenants on the Felder league.

Objections overruled.

Plaintiffs and interveners except.

Intg. 6th:

In whose company and possession was said league of land, when you first and under whom and by what right or title did the parties then living on said land claim to occupy and hold it?

Ans. to 6th Intg:

When in Nov., 1854, I first was on the Felder league there, two young men whose names I think was Hare on said league at the ferry and were preparing as they said, put in a new ferry boat, they said they thought the land vacant, and intended to put a preemption claim on it. Myself and Smith leased it to them for five years, I think but they soon abandoned it. There was another man by the name of Massey living on or near it between the Ferry and Weisses' Bluff, his house, I think, was on the Montgomery league, but he had surveyed out 320 acres as a pre-emption.

6th Ans. Con'd:

And a part of the survey ran over on the Felder league. I purchased his right to this survey and pre-emption claim and leased to him. W. Forbs also had a pre-emption survey mostly on the Montgomery league, but ran over on the Felder league, his house and tenth field was on the Montgomery league and his survey running over on the other. I purchased his pre-emption claim and leased to him for five years. He resided on the place up to the time he moved to Hardin, the county seat, say, some four or five years. I also gave Mr. Callaway the right to cut some timber off the Felder & Montgomery leagues, in consideration that he would superintend them and keep off intruders, &c.

Intg. 7th:

State fully and particularly all the facts and circumstances with the occupation and actual possession of said league of land, from that time subsequently as far as you may have any knowledge upon the subject? Stating in connection therewith your means of knowledge or information upon the subject? Be particular in stating whether or not said league of land

was in actual occupation and possession of any one subsequently to your first knowledge of it? If so, in whose and under whose right or title was it held and occupied and during what period of time and for what length of time was it so occupied and held?

Ans. to 7th Int :

I have answered the substance of this interrogatory in my preceding answers, but I will state farther, that there never was at any time from the time I first saw said league of land, up to the time I sold it, and divided with Mrs. Moore, any person on said league of land, except those above stated, Massey, the Hares & Forbs, living on said league and none that ever lived on it claimed it or set up any title adverse to mine.

Intg. 8th :

Do you know of any taxes having been paid on said land, if so by whom and for what length of time?

Ans. to 8th Interrogatory:

From 1854 to 1866 I gave in said league of land for the assessment and paid the taxes regularly, every year prior to that time, I think, in the year 1848, or 1849, this league together with others had been sold for the taxes as the property of David Brown and bought in by the State. And in 1857, I redeemed the said league of land from the State by paying the taxes then due and took the comptroller's receipt and had it recorded. And so far as I can recollect the above and foregoing answers embrace all I know about the matters referred to, much time has elapsed and some things may have slipped my memory, but from memoranda made at the time for the purpose of keeping the matters in my mind, I have stated all.

Mr. Whitaker: We want to state that that deposition was taken in the case of Gillette & Ball, executors of James Morgan, deceased, against George F. Moore, pending in the District Court of Hardin County in 1872.

Judge Kennerly: We offer pp. 637 and 638 of the printed record, being the proceedings of the District Court of Hardin County, in the case of Gillette & Ball, executors of the estate of James Morgan, against George F. Moore, in which the deposition of Col. Word was read. I want to read these two pages to the jury:

The State of Texas,
County of Hardin.

I, J. K. Salter, Clérk of the District Court of Hardin County, Texas, do hereby certify that the following is a true and correct copy of the entries of record in the District Court of Hardin County, Texas, to-wit:

Book D, page 4:

October Term, 1879.

Gillette & Ball

vs. No. 76

Geo. F. Moore et al.

Trespass to Try Title; Continued by Consent.

Book D, page 100:

Monday, April 18, 1881.

Gillette & Ball

vs. No. 76

Geo. F. Moore.

Trespass to try, etc., Con't by consent.

Book D, page 117:

October Term, 1881.

Gillette & Ball

vs. No. 76

Geo. F. Moore.

Continued.

Book D, page 261 :

April Term, 1884.

Gillette & Ball

vs. No. 76

Geo. F. Moore.

April 14th, first day.

Now comes P. A. Work, Atty. for the plaintiff in this cause, and asks that the same be continued to make parties which request was granted and the same continued.

Book D, page 292 :

Gillette & Ball

vs. No. 76

Geo. F. Moore.

Monday, October 13th, first day. Continued to make parties.

Book E, page 77 :

Gillette & Ball

vs. No. 76

Geo. F. Moore.

October 26th, 1885.

This cause having been called for trial and the plaintiffs and defendants having failed to appear either in person or by attorney, it is ordered by the court that this cause be stricken from the docket for want of prosecution, and that the parties pay the costs herein incurred by each, respectively, for which let execution issue.

Witness my hand and seal of office, at office, in Kountze, the 28th day of December, A. D., 1908.

(Seal)

J. K. SALTER,

Clerk District Court, Hardin County, Texas.

By W. G. WOODARD, Deputy.

Judge Kennerly: We offer in evidence from the printed record on p. 250, the examination of J. M. COOK:

Q. Where do you live? A. At Kountze, Hardin County.

Q. Who are you employed by? A. The Houston Oil Company.

Q. What kind of work do you do for the Houston Oil Company? A. Until recently assisting the attorneys in making investigations in conducting litigation in East Texas.

Q. How recently did you stop that employment? A. Only a few weeks ago.

Q. You are still in the employ of the Houston Oil Company? A. Yes, sir.

Q. I will ask you if in the course of your employment as investigator in the legal department of the Houston Oil Company you were requested to make a search for the heirs of Judge Geo. F. Moore, formerly of the Supreme Court of this state? A. Yes, sir.

Q. Who requested you to make that search? A. Hightower, Orgain & Butler.

Q. What did you do? A. Went to Austin and at Austin I found—

Q. Why did you go to Austin? A. I went there at the request of the attorneys for the oil company to see if the heirs of Geo. F. Moore were still there, and found that none of them were there that I could find. I heard that one of them was at Waco, and I went to Waco, and found that one of them had been there, but had died a short time before that. That was the information I got at Waco. He was the only one I ever heard of.

Q. Were you successful in finding any of the heirs of George F. Moore? A. No, sir.

Q. I will ask you if you were ever requested to make a search for a man named William A. Daniels of his heirs? A. Yes, sir.

Q. Who made that request? A. The attorneys of the oil company.

Q. What did you do? A. I went to Jasper County and other East Texas counties and made diligent inquiry among the old settlers of the county and failed to find him or his heirs.

Q. Did you find anybody who knew of the heirs? A. No, sir; I did not.

Q. I will ask you who you inquired of in Jasper and San Augustine Counties? A. The oldest residents I could find there, people who had been raised there or came there in the early days.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You never found an old citizen that knew such a man as William A. Daniel? A. No, sir.

Q. Did you go to Chireno in Nacogdoches County and inquire who this man William Daniels was who signed this deed with his mark? A. I don't recollect whether I was there on that occasion or not; I have been there often.

Q. You knew that this man who made this deed did live at Chireno in 1855, didn't you. A. I have no recollection of going there on this case.

Q. You knew this man did live there, didn't you? A. Yes, sir; I suppose he did.

Q. You knew he was a blacksmith? A. My understanding was that he was living in San Augustine at the time the deed was executed.

Q. Don't you know that this man, William Daniels, at the time the deed was executed had a blacksmith shop at Chireno? A. I don't know that.

Q. You knew he was a blacksmith? A. No, sir, I did not; I simply knew that he had executed the deed.

Q. Did you try to find his heirs? A. Yes, sir.

Q. You never found any trace of them? A. No, sir, none whatever.

Q. Why didn't you go to where this man William Daniels lived? A. Very likely I did go there. I have no independent recollection of going there on this specific occasion; I have been to Chireno a dozen times in the last three or four years. It is likely that I did go there, but I don't remember it.

Q. You didn't go there and try to find William Daniels or his heirs? A. I don't know whether I did or not.

Q. I ask you the question. A. I have been there on several occasions and looked for the Daniels in East Texas in several counties and failed to find them; whether I looked for them at Chireno, I don't know; I suppose if the information I had led me to Chireno on this search, I went there.

Q. Did you find anything about James G. Cooper and Enoch L. Pitts, witnesses to the deed? A. Not Cooper, but I found Pitts had been dead a number of years.

Q. Cooper died about five years ago, didn't he? A. I don't know.

Q. They both lived at Chireno? A. I don't know where they lived.

Q. What was your information about it? A. I don't remember.

Q. Did you find anything about A. B. Eubank, a Notary Public of Nacogdoches County, who took the acknowledgment to the deed? A. No, sir; I don't know that I did.

CROSS EXAMINATION BY INTERVENERS.

Questioned by Mr. Easterling:

Q. You found that one of the heirs of Judge Moore lived in Waco? A. Yes, sir. I got the information in Austin that one of his boys was in Waco.

Q. What did you understand his name to be? A. I don't remember; I took the name and went to Waco, and found that such a man had died there. He had been a cotton buyer there.

Q. When was that? A. The 25th of November, 1911.

Q. You did not learn that one of his daughters, Mrs. Shelton, lived there? A. No, sir.

Q. You did not learn that another son lived in Washington, Baldy Moore? A. No, sir; that one boy was all I got trace of.

Q. Did you learn who was the executor of Geo. F. Moore's estate? A. I don't know whether I did or not; that has been a year ago, and I have worked on a number of different cases since then; I know I did not find any heirs living.

Q. You did not learn that Walker F. Moore was executor of his father's and mother's estate? A. I guess I did, but I am not sure about it.

Q. Did you apply to Walker F. Moore? A. No, sir, I never saw him.

Q. In your search did you hear of him? A. No, sir.

Q. You didn't learn that he was one of the heirs of Geo. F. Moore? A. No, sir; I did not.

RE-DIRECT EXAMINATION.

Q. You applied to the only party you could find or get information about who was an heir of Geo. F. Moore? A. Yes, sir, I heard of a son living at Waco and I took the next train out of Austin to Waco, and found he had died there, and that was the only child I could hear of Geo. F. Moore. I went there and found he was dead.

Judge Kennerly: From the bottom of p. 338, we offer the testimony of the same witness questioned by Mr. Butler. We also offer the agreement at the bottom of p. 338 as to the destruction of the deed records of Jasper County in 1848, or 1849.

Q. You stated yesterday that you are in the employ of the Houston Oil Company? A. Yes, sir.

Q. I will ask you if you were ever requested to make a search for a man named William Myers? A. Yes, sir, I was.

Q. In this case it appears that the deed from Felder to Daniels was acknowledged before William Myers, a Notary Public of Jasper County, on June 10, 1839; who requested you to make that search? A. The attorneys for the oil company, either Orgain & Butler, or Hightower, Orgain & Butler.

Q. What did you do and find out? A. My information was that the deed was executed in Jasper County, and I went there for the purpose of locating Myers, if he was living, and I learned that he was dead.

Q. How long did you find out that he had been dead?

A. I don't remember just how long he had been dead.

Q. A long number of years? A. Yes, sir, he had lived there a long time ago, but was not there any more, and his record could not be found in the court house.

Q. Where did you hunt for his notarial record? A. I would naturally look in the office of the county clerk.

Q. What did you find out about it? A. It was not there.

Q. Do you know whether or not the records in the office of the county clerk of Jasper County were ever burned?

The Witness: No, sir, not of my own knowledge, I don't know.

Mr. Butler: I offer in evidence an agreement of counsel as to the destruction of the deed records of Jasper County in 1848, or 1849.

Judge Kennerly: We offer from p. 586 the testimony of Mr. Cook when he was again put on the stand:

Q. Where did you go day before yesterday? A. San Augustine.

Q. Who sent you there? A. Hightower, Orgain & Butler.

Q. I will ask you to state whether or not since you left here you have made any inquiry or search in San Augustine County for a man named William A. Daniel, or William Daniels? A. Yes, sir.

Q. I will ask you where and from whom you inquired? A. I made the inquiry in Austin from H. B. Fall. I met him at Chireno. I telephoned him to meet me there.

Q. Did you get any information from Mr. Fall as to Daniels? A. Yes, sir, I did.

Q. I will ask you whether or not you have been able to find this man William Daniels or any of his heirs? A. No, sir, I have not.

Q. Did you find out whether a man named William Daniels ever lived near Chireno in San Augustine or Nacogdoches County? A. Yes, sir.

Q. Did you find whether he was living or dead? A. Yes, sir, he died about the close of the Civil War.

Q. Did you find whether he left any heirs or not? A. Yes, sir, two.

Q. Are those children dead or alive, according to your information? A. One of them is dead and died soon after—

Judge Kennerly: We offer from the printed record beginning at the bottom of p. 229, and continuing on to p. 230, being an agreement, which I now read to the jury.

(NOTE—These agreements are all on file among the papers in this cause.)

Judge Kennerly: We offer now the testimony of TOM SHEFFIELD from the printed record p. 517, and we offer it for the purpose of showing the Menard Records, in his possession:

Questioned by Mr. Butler:

Q. Where do you live? A. In Tyler County.

Q. You are the County Clerk of Tyler County? A. Yes, sir.

Q. What are the records I hand you? A. These are the old Menard County records.

Q. Where did you get those? A. In Tyler County.

Q. Where in Tyler County, out of your office? A. Yes, sir, at Woodville.

Q. Are those a portion of the deed records of Tyler County as they exist in your office? A. Yes, sir.

Q. If you were called upon to exhibit the deed records of Tyler County, would those two books be among your deed records? A. Yes, sir.

Q. Do you know how long those books have been in the office of the County Clerk of Tyler County? A. No, sir; I do not.

Q. Were they there when you took charge? A. Yes, sir.

Q. Describe the appearance of those books as to age? A. They are old.

Q. Do they appear to be very old books? A. Yes, sir.

Q. Do they appear to have been handled a great deal and worn a good deal? A. Yes, sir.

Q. What is the condition of the paper in the books as to preservation? A. Well, it is worn.

Q. What is the condition of the ink as to being faded? A. It is faded.

Q. I will ask you if those old books have ever been transcribed? A. Yes, sir.

Q. Do you know for what purpose they were transcribed?

The Witness: They were transcribed by the order of the commissioners Court of Tyler County.

Q. This is Vol. C of the Deed Records of Tyler County? A. Yes, sir.

Mr. Whitaker: We do not concede that these are the Menard Records or that Sheffield was the proper custodian

of them. When they offer the deeds, we will make the proper objections.

Mr. Gordon: What you offer is from old books purporting to be the records of Menard County.

Judge Kennerly: We offer what the witness produced here before. If counsel make any question about the records, we will send and get the clerk.

Mr. Whitaker: No, sir; he offers certain old books which the witness denominates Menard Records. The Menard Records belong in the custody of the County Clerk of Liberty County as a matter of law, and whether these are the records or not the witness does not know.

Judge Kennerly: We offer these records of Menard County and spread thereon a deed from Charles A. Felder to William A. Daniel, dated June 10, 1839, acknowledged on June 10, 1839, by William Myers, Notary Public of Jasper County, and filed in the office of the County Clerk of Menard County, February 23, 1842, and recorded in said Menard County records, Vol. A, p. 119.

"Republic of Texas,
Jasper County.

Be it known, that on this 10th day of June, Eighteen Hundred and Thirty-nine, I, Charles A. Felder, of the County of Jefferson, & Republic aforesaid, for & in consideration of the sum of One Thousand Dollars to me in hand paid the receipt whereof is hereby acknowledged have this day granted, bargained, sold and conveyed and by these presents do grant bargain sell & confirm in bona fide sale to William A. Daniels of the County of San Augustine & Republic aforesaid all

that tract of land containing Four thousand four hundred & twenty-eight acres of land commencing on the W. bank of the River Neches & running thence W. 9.816 yards Thence South 2500 yards Thence E. 10,635 yds. to said River Thence with said River to the place of beginning 15 labors arable 10 labors grazing land it being the League of land granted George A. Nixon commissioner of Zavallas Colony on the 29th August 1835 and for a more particular description of which reference is hereby made to the original lot & field notes on file & of record in the General Land Office of this Republic and for the aforesaid William A. Daniels his heirs and assigns to have and to hold said land together with all and singular the rights rents members and appurtenances thereunto belonging or appertaining and I the said Charles A. Felder do and will for myself my heirs executors administrators and assigns forever warrant and defend the above described league of land unto the said William A. Daniels his heirs and assigns, not only against myself my heirs and assigns but against the claim of all others persons whatsoever claiming or to claim the same or any part thereof. In Testimony whereof I have hereunto set my hand and affixed my seal on the day and date above written.

(Seal)

CHARLES FELDER.

Signed Sealed and delivered
in the presence of

CHARLES A. CLAVINGER.

N. H. LANT.

The Republic of Texas,
County of Jasper.

Personally appeared before at my office Charles A. Felder who acknowledged to the above and foregoing deed for the use and purposes therein contained and set forth. Given under my hand and seal of office in the Town of Jasper this the 10th June A. D. 1839.

WM. MYERS,
Notary Public.

Republic of Texas,
County Menard.

I do hereby certify that the above is a true copy of the original as recorded in my office this the 23rd day of February, 1842.

JAMES B. ARNETT

By C. C. ARNETT, D P County Recorder."

Mr. Whitaker: We object to the introduction of the deed because, first, they have not properly and sufficiently accounted for the original. Second, because the record they have offered as a record does not come from the officer who under the law is the proper custodian of that record, the proper custodian of the record being the County Clerk of Liberty County. Third, because the deed was never acknowledged before any officer whatever, and had never been spread upon any record legally. Fourth, because the officer who signs his name as a Notary Public, to-wit: Wm. Myers, was not in fact a Notary Public at the date he takes that acknowledgment, and to aid the court's judicial knowledge in connection with that objection, we offer a certificate from the office of the Secretary of State showing who were civil

officers in Jasper County in June, 1839, and that William Myers was not then a Notary Public. Fifth, we object to the deed because at the time William Myers purports to have taken the acknowledgment, if he had been a Notary Public, he was not authorized under the law to take that acknowledgment, and there has been no law validating such acknowledgment. Sixth, because the deed purports to be a deed from Charles Felder and not Charles A. Felder, and no evidence has been produced to show that they are one and the same man.

Mr. Gordon: It is understood that those objections are made on behalf of the plaintiffs as well as the interveners.

The Court: Do you offer the deed as a muniment of title or as a circumstance that there might have been such a deed in existence?

Judge Kennerly: I offer it as a circumstance and will afterwards offer it as a muniment of title.

Mr. Whitaker: We object to it because its authenticity has not been proven.

The Court: Gentlemen of the Jury the defendants offer the record book presented by the County Clerk of Tyler County, showing that on the 23rd of February, 1842 there was recorded in what purports to be the records of Menard County an instrument signed by Charles Felder, and witnessed by Chas. Clavinger and N. H. Lant, and which purports to have been acknowledged on the 10th of June, 1839 before a man who signs himself as William Myers, Notary Public. The instrument with the certificate of acknowledgment appears from the record offered in evidence to have been recorded in the public records of Menard

County on the 23rd of February, 1842. The plaintiffs and interveners have objected and their objections are overruled and the record book of Menard County from the custody of the County Clerk of Tyler County is allowed to go to the jury, not for the purpose of showing that Charles A. Felder parted with the title to the land, but as a circumstance to be considered by the jury in determining the question as to whether or not Charles A. Felder did deed the land described in that deed to William A. Daniels—that is to say, the court permits you to receive the old record book from Tyler County with the view to taking that and all other circumstances that may be presented to determine whether in point of fact Charles A. Felder did deed the land to Daniels, and for that purpose alone, and it is not to be considered by the jury as a muniment of title for the land, but as a record permitted to go to the jury to be given by you such weight as you think proper in determining the question of whether Charles A. Felder deeded the land to Daniels.

Mr. Gordon: We except to the ruling of the court.

Mr. Whitaker: I want to call attention to the fact that it is William A. Daniel in the original record. We object to that copy because it is not a copy of the record. I have seen the record and I will state that it is not a copy of the record.

The Court: That is a matter I can not determine at this time.

Judge Kennerly: I will state that in the original record it is copied William A. Daniel.

Judge Kennerly: We now offer in evidence certified copy of deed from William A. Daniel, signed William

Daniels, dated February 5, 1855, with witnesses James D. Cooper and Enoch L. Pitts, to Thos. J. Word, acknowledged by William A. Daniel February 5, 1855, before A. B. Eubanks, filed in the office of the County Clerk of Tyler County, February 13, 1855, ato'clock A. M.

"The State of Texas,

Nacogdoches County, ss:

Know all men by these presents that I William A. Daniel of the of the County and State aforesaid and formerly of San Augustine County in said state for and in consideration of the sum of One Hundred Dollars to me in hand paid by Thomas H. Word, the receipt whereof is hereby acknowledged have given granted bargained sold released quit claimed and transferred and do hereby give grant bargain sell release quit claim and transfer unto the said Thomas J. Word, his heirs and assigns all the following leagues tracts or parcels of land situated lying and being in the County of Tyler and State aforesaid that is to say One League of land in said County of Tyler on the west bank of the Neches River being the same granted to Mark M. Bradley on or about the 27th day of August, 1835, and conveyed to me by the said Mark M. Bradley, on or about the 18th day of September 1835 and for a more accurate particular and full description of the said league of land reference is hereby had and made, to the original Survey and field notes and plots and other papers on file in Archives of the Government the general Land Office and other proper offices of the said State and also one other League of Land in said County of Tyler

on the west bank of the Neches River, and being the league of land granted to Charles A. Felder, on or about the 29th day of August 1835 and granted to me by the deed by the said Charles A. Felder on or about the 10th day of June 1839, and for a more accurate full and particular description of said last mentioned leagues of land reference is hereby made and had to the original survey, field notes and plots and other papers on file in the Archives of the Government, the general land office and other proper offices of the state. An also one other league of land in the said County of Tyler, on the west bank of the Neches River being the same league of land granted to William N. Cox (or as sometimes called Williamson B. Cox) on or about the 22nd of August 1835 lying and being in said County of Tyler on the west bank of the Neches River and granted to me by Deed, by the said William N. Cox on or about the 10th day of February 1840 and for a more full accurate and particular description of the said Last mentioned League of Land, reference is hereby had and made to the original survey field notes, plots and other papers on file in the Archives of the Government, the general land office, and other proper offices of said State, together with all and singular the rights, Members, hereditaments and appurtenances to the same belonging or in anywise appertaining.

To have and to hold all and singular the premises above mentioned unto him the said Thomas J. Word, his heirs and assigns forever and I hereby bind myself, my heirs, executors and administrators, to warrant and forever defend, all and singular the premises afore-

said unto the said Thomas J. Word, his heirs and assigns against every person whomsoever claiming or to claim the same or any part thereof, by, through or under me my heirs or assigns but against no other claim of any kind whatsoever.

Witnessed my hand and seal this fifth day of Feb-
ruary, A. D. 1855.

(Seal) his
WILLIAM X DANIELS.
mark

Test:

JAMES G. COOPER,
ENOCH L. PITTS.

The State of Texas,
County of Nacogdoches.

Before me the undersigned Notary Public in and for the said County and State aforesaid personally came William A. Daniel to me well known and acknowledged that he signed, sealed and delivered the foregoing deed written on the two preceding pages of this sheet for the consideration uses and purposes therein written certifying thereto.

Witness my hand and official seal fifth day of February A. D. 1855.

(L. S.) A. B. EUBANKS, N. P. of N. C.

Filed in my office for record this the 13th day of
February A. D. 1855 at o'clock a. m.

E. J. PARSONS, C. C. T. C.

I hereby certify that the above and foregoing deed as recorded is a true copy of the original deed as filed

and was duly recorded this the 13th day of February
A. D. 1855 at 2 o'clock p. m.

E. J. PARSONS, Co. Clk. T. C.

State of Texas,
County of Tyler.

I, Tom Sheffield, Clerk of the County Court in and
for Tyler County, Texas, do hereby certify that the above
and foregoing is a true and correct copy of the deed from
William A. Daniel to Thomas J. Word as appears of
record in my office in Book B, pages 566 et seq., Deed
Records of Tyler County, Texas.

Witness my hand and seal of office this 25th day
of November, 1912.

(Seal)

TOM SHEFFIELD,
Clerk County Court, Tyler County, Texas."

Mr. Whitaker: We object to that deed as a deed from
William A. Daniel as stated by plaintiff, and we want the deed
itself to show what it is. It is signed William Daniels (his
mark).

The Court: The exact facts are that in the body of the
deed the grantor is recited as being a man called William A.
Daniel, and the signature to the deed shows William Daniels
by making his mark.

Judge Kennerly: We now offer in evidence certified
copy of the same deed from the records of Hardin County
showing its record in Hardin County, and its filing for record
in Hardin County on the 11th of July, 1900 and, showing
its record in Hardin County, Vol. X, p. 227.

Mr. Whitaker: We object to those deeds as being deeds
of William A. Daniel.

The Court: I don't exactly see how far the doctrine of idem sonans would go in a case of this kind.

Mr. Whitaker: I don't know whether it is the proper time to make it or not, but I want to make the objection that there is a variance between the grantors, that it is not the same grantor.

Mr. Gordon: We make the further objection that there is no proof here that William Daniels is identical with William A. Daniel, and the papers themselves do not evidence that they are the same.

The Court: I overrule the objection and state in so doing that it raises a question probably of the sufficiency rather than the legal admissibility of the evidence.

Judge Kennerly: We offer now Vol. A, of the Menard Records which has just been offered of the deed from Felder to Daniels, and on p. 9 of said Vol. A of the Menard Records, the record of another deed from Charles F. Felder to Joshua Smith dated May 21, 1840, the acknowledgment being taken before G. V. Lusk, Chief Justice and Notary Public of Shelby County on May 25, 1840, filed for record in Menard County on March 22, 1841, and the deed recites that he conveys to Joshua Smith.

"Republic of Texas,
County of Shelby.

Know all men by these presents: That I Charles F. Felder citizen of the Republic aforesaid for and in consideration of the sum of One Thousand Dollars cash in hand paid the receipt whereof is hereby acknowledged hath this day bargained, sold and conveyed and by these presents doth bargain sell and convey

unto Joshua Smith all that certain tract or parcel of land lying and being situated on the west side of the Neches River The same to which I am entitled as a Colonist in the Colony of Lorenzo de Zavalla the title and possession of which was given by George Antonio Nixon Commissioner on the 29th day of August A. D. 1835, for a more particular description of said league of land reference is hereby made to the original title now on file in the General Land office of said Republic And for the said Joshua Smith to have and to hold the above described league of land with all the hereditaments thereunto belonging to himself his heirs and assigns forever, and I the said Charles F. Felder do for myself my heirs executors and administrators will warrant and forever defend the right title and claim of said land unto the said Smith his heirs and assigns against the claims of all persons whomsoever claiming the whole or any part thereof.

In Testimony whereof I the said Charles F. Felder hath hereunto set my name affixed my seal this the 21st day of May, A. D. 1840.

(Seal)

CHARLES F. FELDER.

In the presence of

SAMUEL POORE.

THOS. W. BROWN.

Republic of Texas,

County of Shelby.

This day personally appeared before me, G. V. Lusk, C. J. & Ex Off N. P. in and for said county Charles F. Felder whose signature appears to the fore-

going instrument of writing and after being sworn the same decrees it to be his and placed there for the purpose of sale therein set forth.

Given under my hand and seal of office on 25th day of May, A. D. 1840.

G. V. LUSK,

C. J. L. C. & Exofficio N. P.

Republic of Texas,
Menard County."

I, James B. Arnett, Clerk of the County Court in and for said county, do hereby certify the foregoing instrument was presented for record and duly recorded in my office in Book A, page 9 & 10.

In Testimony whereof, I hereunto assign my name and affix my private seal having no seal of office this the 22d day of March, A. D. 1841.

(L. S.) JAMES B. ARNETT, Clk. Cty. Ct."

Mr. Whitaker: We object to that, first, on the ground that we urged as objections to the deed from Charles A. Felder to William A. Daniel, because the certified copy does not come from the proper custodian of the record, to-wit, the Clerk of the County Court of Liberty County. Second, on the ground that it is a deed from Charles F. Felder, and not Charles A. Felder, to Joshua Smith, and therefore, no title having been shown in Charles F. Felder, the deed is inadmissible as conveying any title to this league of land. The names are not the same, and there is no evidence which shows or tends to, show that they are the same persons.

Mr. Gordon: We join in those objections and for the plaintiffs and interveners we make the further objection that there being an affidavit of forgery against this deed, its execution has not been proven, and being an improper record, is not admissible without the proof of execution of the original deed, and, again, that the acknowledgment to this paper is not sufficient to entitle it to record in that it fails to show that the maker of the instrument acknowledged that he had executed the paper, and hence the proof accompanying the paper, if it were a copy of a correct record coming from the proper source, is not sufficient.

Mr. Whitaker: The interveners join in those objections.

The Court: The question in my mind is the discrepancy in the name of Charles F. Felder and Charles A. Felder. I believe substantially this certificate embraces the requirements in existence at that time. I can not arrive at any other conclusion from the certificate that the Charles F. Felder who signed the deed, under the certificate of the officer which I have read—at any rate, I believe it would be such a certificate as would entitle the instrument to record. I am not certain as to that, and I would like to hear you discuss the meaning of the certificate.

Judge Kennerly: The offer of the testimony as to the record of the deed on the Menard Co. record is offered as a circumstance to show that Charles A. Felder made, executed and delivered the deed to Joshua Smith. I do not offer it as a muniment of title at this time, but as a circumstance.

The Court: Then the deed from Felder to Joshua Smith is not in at this time only as a circumstance tending to show that Chas. A. Felder conveyed the land to Joshua Smith.

Judge Kennerly: It is the Menard record of the deed I have offered, the court will understand.

The Court: What is now offered is what purports to be a record book of Menard County containing a deed executed by one who signs his name as Charles F. Felder, conveying to Joshua Smith the land described in the deed. The court overrules the objections to the instrument on the ground that counsel now states that he does not offer the instrument as a muniment of title, but simply as a circumstance to be considered by the jury in determining whether Charles A. Felder had deeded the land to Joshua Smith. The record is permitted to go to the jury for that purpose, the court being careful to tell you that it is admitted solely for the purpose stated by counsel, viz: Not as evidence that Charles A. Felder had deeded the land, but as a circumstance to be considered by the jury, along with all the facts and circumstances of the case to enable you to determine whether Charles A. Felder made a conveyance of the land to Joshua Smith. It is restricted to that purpose, and must be so considered by the jury.

Judge Kennerly: I ask the court to explain to the jury what it is a record from.

The Court: This instrument is from a record book of Menard County brought here by the Clerk of Tyler Co. It is agreed that the Clerk may not bring the record book here, and you are to understand that it is offered as though the County Clerk of Tyler County had the old book here and read from the record of Menard County. The record here is in the form of a deed, but is not to be understood by the jury as divesting the title out of Felder and into Joshua Smith. It is permitted to be read to you for the purpose of showing there was such

a deed as that on the records of Menard County, and that may be considered by the jury solely for the purpose of determining whether Charles A. Felder executed a deed to Joshua Smith.

Judge Kennerly: We now offer in evidence certified copy of a deed from Joshua Smith to Mary E. Brown, covering the Chas. A. Felder league in Hardin Co., Texas, dated February 27, 1850, with Wm. C. Pitts and John Smith as witnesses, acknowledged before O. C. Cantly, Notary Public of Anderson County on the 20th of April, 1854, filled for record in Tyler County, October 7, 1854, at six o'clock P. M. We also offer a certified copy of the same deed taken from the records of Hardin County, Texas.

"Mississippi,

Pontatoc County.

Know all men by these presents: That I, Joshua Smith citizen of the state and county aforesaid, for and in consideration of One Thousand Dollars to me in hand paid the receipt whereof is hereby acknowledged hath this day granted bargained sold and conveyed and by these presents doth bargain sell and convey unto Mary E. Brown all that tract or parcel of land containing 4428 acres lying and being situated in Tyler County, and on the West side of the River Neches and it being the headright of Charles F. Felder to which he was entitled as a Colonist in Lorenzo de Zavalla Colony the title deed and possession of which was given him by George Antonio Nixon on the 29th August A. D., 1835, and for a more particular description of which reference is hereby made to the original deed now on file in the General Land Of-

ficie at Austin and for the said Mary E. Brown to have and to hold the above described league of land with all the right and appurtenances thereunto belonging to herself her heirs and assigns forever and I the said Joshua Smith do for myself my heirs and executors and administrators Warrant and forever defend the right title and claim of said league of land unto the said Mary E. Brown her heirs and assigns against the claim of all persons whomsoever claiming the whole or any part thereof by or through me but against none others.

In testimony whereof I the said Joshua Smith have hereunto set my hand and affixed my seal using a scrawl for a seal this 27th day of February A. D., 1850 in presents of

Test:	JOSHUA SMITH,
WILLIAM C. PITTS	(Seal)
JOHN SMITH.	

State of Texas,
County of Anderson.

Before me A. G. Cantley Notary Public in and for Ander Co. at my office at Palestine personally appeared John Smith one of the subscribing witnesses to this instrument of writing hereto attached who upon oath states that he saw the grantor sign his name thereto and that he signed it as a witness at the instance & request of the said Grantor.

In testimony of which I hereunto set my hand & affix my official seal at my office at Palestine this the 20th day of April 1854.

(L. S.) ANDLEY G. CANTLEY, Not Pub A. C.

N. B. In the 18th line 1st page of the original the word (the) is interlined above.

Filed in my office for record Oct. 7th, A. D. 1854,
at 6 o'clock p. m.

E. J. PARSONS, C. C. T. C.

By W. M. FULGHAM, Dept.

I hereby certify that the above and foregoing deed as recorded is a true copy of the original as filed and was duly recorded this the 20th day of Oct. A. D. 1854 at $\frac{1}{2}$ past nine o'clock p. m.

E. J. PARSONS, C. C. T. C."

Said copy was duly certified.

Judge Kennerly: From the printed record p. 274, we offer an agreement that Mary E. Brown married Wm. B. Frazier.

Judge Kennerly: We next offer in evidence certified copy of General Warranty Deed from Mary E. Frazier and husband, Wm. B. Frazier, to T. J. Word, dated January 19, 1855, conveying the Chas. A. Felder league in Hardin Co., Texas, acknowledged before W. S. Somers, Notary Public of Sabine County, and filed for record in Tyler County on January 24, 1855, and reciting a consideration of \$3000.00. It is a certified copy from Tyler Co. shown to have been filed for record in Hardin County August 1, 1895 and recorded in Book S p. 142.

Judge Kennerly: We offer in evidence certified copy of deed from R. O. Lusk to Thos. J. Word, dated October 5, 1855, acknowledged before W. H. Vaughan, Clerk of the County Court of Anderson County, January 20, 1856, filed for record in Tyler County, February 29, 1856.

"The State of Texas.

County of Leon.

Know all men by these presents, that I, R. O. Lusk for a valuable consideration to me in hand paid do yield, renounce, transfer and convey to Thomas J. Word all the right, title and interest I have in and to the following tracts of lands to-wit: One league granted to D. F. Edwards in the County of Tyler, one league granted to C. A. Felder also in Tyler County, one league granted to Jacob Shilton in Tyler or Liberty County and also one league granted to Joseph Ellory in the County Tyler all which land I have heretofore held and passed as agent for Wm. B. Wallace and others by agreement have this day set over and transferred the same to Thomas J. Word. In testimony of which I hereunto set my hand and scroll by way of seal on this 5th day of Oct. A. D. 1855.

R. O. LUSK.

Attest:

WILLIAM S. STRUIUS,
JOHN SMITH.

The State of Texas,

County of Anderson.

Before me, W. H. Vaughn, clerk of the county court in and for the county of Anderson, on this day personally came John Smith, one of the witnesses to the foregoing deed, who is to me well known and on his oath says that he saw R. O. Lusk, the grantor, sign, seal and deliver the same and heard him acknowledge that he did so for the uses & purposes therein set forth & that he signed the same as a witness at the request of the grantor.

Witness my hand & seal of office at Palestine the
20th day of February, A. D. 1856.

(L. S.) W. H. VAUGHN,
Clk. C. C. A. C.

Filed in my office for record this the 29th day of
Feb'y A. D. 1856 at 12 o'clock M.

E. J. PARSONS,
Co. Clk, C. C. T. C.

I hereby certify that the above and foregoing is a
true copy of the original as filed & was duly recorded
this the 29th day of Feby A. D. 1856 at 10 o'clock P. M.

E. J. PARSONS,
Co. Clk. T. Co.

The State of Texas,
County of Tyler.

I, T. C. Mann, clerk of the County Court of Tyler
County, Texas, do hereby certify that the foregoing is a
true and correct copy of the original deed from R. O.
Lusk to T. J. Word as the same appears of record in my
office in Book C, page 186.

Given under my hand and the seal of the said court
at office in Woodville this 23rd day of April, 1898.

T. C. MANN, Clerk.

By F. W. GEISENDORFF, Deputy.

(Seal)

The State of Texas,
County of Hardin.

I, J. J. Bevil, clerk of the County Court in and for
said county, do hereby certify that the above and fore-
going instrument, with its certificate of authentication,

was filed for record in my office the 22d day of Nov., 1912, at 10:15 o'clock A. M., and duly recorded the 22d day of Nov., 1912, at 10:30 o'clock A. M., in Deed Record of said county, in Vol. 58, page 221-2.

Witness my hand and the seal of the County Court of said county, at office in Kountze, the day and year last above written.

J. J. BEVIL,
County Clerk, Hardin County, Texas.

By M. L. CHANCE, Deputy. •
(Seal)"

Judge Kennerly: This morning we withdrew the offer of a part of the answer of T. J. WORD to the third interrogatory on p. 102 of the Pollard record. We now offer the balance of that answer in connectoin with our claim of title from Chas. A. Felder to William A. Daniel, and from Charles A. Felder to Joshua Smith, and in connection with the Lusk deed. I have shown a search for the instrument, and there is a waiver on file. I offer that part of the answer to the third direct interrogatory contained on p. 102, as follows:

* * * I found also that several other persons had deeds on record for the said league. R. O. Lusk had a deed for that league and others that I had bought as stated above. *
* *

Mr. Whitaker: We do not object to that sentence which says: "I found also that several other persons had deeds on record for the said league of land." The balance of it we do object to because that would be permitting them to prove title by other than the prescribed method, to wit: A written instrument duly executed. Having shown no effort to get such

instrument or account for its absence, there is no predicate laid for the introduction of the evidence.

The Court: I mean to say that if there is any proper way, I would permit you to show that the deed on which you rely, which otherwise would be admissible in evidence, and which could not be produced on the trial, in fact existed, and after showing the fact of its existence, you would be permitted to show the contents of the deed and how it affected the land in controversy. Here is a witness who testifies and from the statement contained in the answer manifestly to my mind deriving his information from the circumstances I have permitted to be offered. He has not seen the original instrument, but makes the statement based upon what has been stated in the evidence already offered to the jury, to wit: The deed recorded in Menard County records. I sustain the objection.

Defendants except.

Judge Kennerly: We now offer in evidence as a muniment of title certified copy of a deed dated June 10, 1839, and acknowledged before William Myers, Notary Public Jasper County June 10, 1839, filed February 23, 1842 with the County Clerk of Menard County, said certified copy being signed by the County Clerk of Menard County under his hand and seal, which deed purports to convey from Charles A. Felder to William A. Daniel the Charles A. Felder league in Hardin County, Texas, a part of which is now in litigation in this suit. (This instrument is elsewhere copied in full in this Bill.)

Mr. Whitaker: We object to that deed as a muniment of title on the grounds stated: First, because the defendants have not properly accounted for the original instrument as a

predicate for introducing a certified copy. Second, because the certified copy does not come from the officer who under the law is the proper custodian of the records of Menard County, the proper custodian of such records being the clerk of the County Court of Liberty County. Third, because the deed was never acknowledged before any officer whatever, the purported officer, Wm. Myers, who signs himself as a Notary Public was not a Notary Public at that time, and to aid the court's judicial knowledge of that fact, we offer in connection with this objection, a certificate of the Secretary of State of Texas showing such fact—that William Myers was not a Notary Public. Fourth, that if he had been a Notary Public, he did not have at that time the right or power to take the proof of a deed, and therefore his authentication of a deed as a Notary Public, if he was such, is a nullity. Fifth, because the deed purports to be executed by Charles Felder and not Charles A. Felder, and that Charles Felder and Charles A. Felder is not one and the same person, and there is no proof which shows such to be a fact. There is no proof of identity and on top of that, we say we have filed an affidavit of forgery which places upon them the burden of establishing this deed as at common law, and they have failed to produce any fact here which shows that Charles A. Felder ever executed that deed.

The Court: The question presented is one that everybody connected with the case ought to give careful attention to because it is a vital question in the case. If I should err in the admission of the testimony now, of course it would be such error as would be vital to the judgment in the case. If the instrument is admissible, and I exclude it, I think it would be a fatal error, and if it is not admissible, it would be error to let

it in. Therefore, I have been glad to hear the discussion. It has been enlightening to me and enabled me to give a great deal of thought to the subject. I have one view of it that is somewhat different from the view you present. In other words, I understand the validating acts were to relieve against improper records of otherwise genuine instruments. It is where on account of the crudeness of acknowledgments or the carelessness of official business that conveyances have gone upon the records improperly that the legislature have passed the acts on account of public policy, and has provided that if those instruments have been recorded 10 years, they shall be valid for all intents and purposes as though the records were sufficient in the first instance. I draw a distinction between that class of cases, and a deed that has been assailed in the trial by the filing of an affidavit of forgery, and to my mind it is a very vital matter between the two character of cases. I have here a very carefully prepared brief which I think is a correct digest of the authorities, and the law as declared in the adjudicated cases where a deed has been recorded for thirty years, and a certified copy is offered, being duly filed among the papers with an affidavit of the loss of the original, the same is admissible in evidence in like manner as the original would be. The certified copy of the record stands as the original deed on the record. In order to admit the original, it must be proved, first, that it came from the proper custody; second, that it is free from suspicion; third, that the facts corroborative of its genuineness shall be produced. Proper custody may

be presumed from a proper and valid record of the deed. I think it is a fair deduction from the law in 77 Texas, among other expressions in the opinion of the court that the registration does not constitute notice, nor would any lapse of time make admissible as an ancient instrument a certified copy from the record of the deed. An instrument that is 30 years old that comes from the proper custody, that comes free from circumstances of suspicion and comes connected with facts corroborative of its genuineness is admissible, because it proves itself as an ancient instrument. If an instrument goes on the record improperly, then the production of the record 30 years old would not show that it came from the proper custody, because it went on the record improperly. I am inclined to think that the instrument was not properly recorded. That William Myers at the time of taking the acknowledgment was not a Notary Public, and the law in force at that time did not authorize William Myers as a Notary Public to take the acknowledgment. Therefore, that being true, the deed having gone to record improperly, it fails to possess that element of its legal standing as an ancient instrument in not coming from the proper custody. I sustain the objection.

Defendants except.

Judge Kennerly: We now offer in evidence as a muniment of title certified copy of a deed from Charles F. Felder to Joshua Smith, dated May 21, 1840, executed in the presence of Samuel Poore and Thos. W. Brown, and acknowledged before G. V. Lusk, Chief Justice and ex officio Notary

Public of Shelby County, May 25, 1840, and filed for record in Menard County and recorded in Book A pp. 9 and 10 of such record, and for a consideration of One Thousand Dollars cash conveyed to Joshua Smith the Charles A. Felder league of land in Hardin County, part of which is involved in this suit. I would like to say here since the court has ruled on the deed from Felder to Daniels, that I want to save the point in the record to that. I may not have given it to the stenographer as fully as I should have.

(This instrument is elsewhere fully copied in this Bill.)

The Court: I want the upper court to have an absolute photograph of what happens here.

Mr. Gordon: To this deed now offered we renew the objections made at the time it was first offered. I don't think it is necessary to repeat the objections.

The Court: My recollection is that it ought to have been recorded in Liberty and not in Menard County, and the other was that the grantor styles himself Charles F. Felder instead of Charles A. Felder.

Mr. Gordon: Yes, sir; and another is that the deed is attacked as a forgery, and there are no corroborative circumstances accompanying the offer of the deed to show that the deed probably existed and was genuine. Another objection is that there has been no proper predicate laid for the introduction of secondary evidence of this paper, it having been attacked as a forgery, and the burden of proof being in the party offering it to establish its genuineness as at common law.

Judge Kennerly: The court can withhold its ruling on this deed.

The Court: I can do that or act on it now.

Judge Kennerly: I prefer that you withhold the ruling for the present.

The Court: It would be best to introduce the facts and then let me rule on the objections.

Judge Kennerly: In the instrument offered yesterday I want to get the matter in the record. I would be glad for the court to include in the record this statement: That the judge of the court himself has no personal knowledge of whether William Myers was or not a Notary Public, and that the certificate from the office of the Secretary of State is not offered by the plaintiffs and interveners as evidence, but merely offered to aid the court in reaching the conclusion.

The Court: Of course I have no personal knowledge of it; I did not come to Texas until 1880. I understood that the certificate of the Secretary of State was offered and intended to be incorporated into the record, otherwise that would not appear in this case on appeal. I think the appellate court ought to look at a faithful photograph of what has occurred here.

Mr. Gordon: We offer it in connection with the deed.

Civil Officers of the County of Jasper.

Date of app or elec	Names	Office	Remarks
	Jos. Mott	Chief Justice	Resigned
39	James Hoggate	Sherif commix. Apl 5 '39	out 1st Feby 41
Feb 4	William Myers	Clerk Dist Court	out 1st Feby 41
	Argalus G. Parker	Clerk of County "	out 1st Feby 41
		Dist Attorney	
	Wm. Williams	Jus. Peace	out
	Wm Pamplin	do do	out
	Martin B. Lewis	do do	out
	Thos B. Hewling	do do	out
39	John Bevil	Chief Justice commis'd	Resigned Aug. '39
Feb	Henry Stagner	Coroner commis'd Apl. 5 '39	out 1st Feby 41
Feb 4	James Armstrong	Pres't bd L'd comrs'	
	Henry W. Saddreth	Asso. "	
	Thomas B. Huling	Asso. "	
	Robt A Pennel	Clerk "	
	Martin B. Lewis	County Surveyor	

1839	William Myers)	Jus Peace	Resigned
Feb 4	N. H. Carrol)	Constable . Jasper Beat No. 1	
" "	Try Taylor		
" "	Samuel S. Walters)		
" "	William Seabold)	Jus Peace Lavala Beat No. 2	
" "	Richards Simmons)	Resigned July	
" "	William Chadwick)	Jus. Peace	
" "	A. F. Albright	Constable) Little Cow Creek	
1839) Bear No. 3	
Feb 4.	N. H. Cochran)	Jus. Peace	Resigned
	William H. Stark)		Resigned
	A. L. Stark	Constable Sabine Beat No. 4.	
1839			
June	Hannibal Good	Jus Peace Beat No. 1	Com'd. July 11 '39
	William Pamplin	" " " 5)	" " " "
		Walnut run	
	William Allen	" " do	" " " "
Aug 16	Martin Parmer	Chief Justice	" Aug. 11, '39
Date of Comm			
1840			
Feb'y 3d	M. B. Lewis)	Chief Justice Elected by Cong. 30 Jany	
)	term expired & Relected	
Jany 31	Seth Swist)		

	Joseph Mott)	do do)	" "	
	Wm Pamplin)	do No 4)	" "	
	John T. Lewis)	do do)	" "	
	Bennet H. Zachary)	do No 5)	" "	
Date of				
Com.				
1841				
March 15	Benj'm Richardson	Jus Peace Beat No 6	elected 1st Feby 41	
May 11	Josiah Stephenson	Jus Peace Beat No. 1	" 13th Mar 41	
June 7	Martin B. Lewis	County Surveyor	" 7th Sept 40	
1842				
Feby 4	C. Hart	Jus Peace Bt No. 1	— 1st Jan'y 42	
July 10	James Powell	J. P. Pre. No. 4	— elected Mar. 12 '42	
July 10	John Frazer	" " 2	" May 21 "	
July 10	Nathan Patson	" " 2	" " "	

THE STATE OF TEXAS,
Department of State.

I, JOHN L. WORTHAM, Secretary of State of the State of Texas, DO HEREBY CERTIFY that the attached and foregoing is a true and correct copy of list of Civil Officers of Jasper County, Texas, for the years 1839 to 1842 inclusive, as same appears of record in the records of this Department in Book 255, Pages 295-6 and 348, and in Book 256, Page 58—Executive Records for Civil Officers.

IN TESTIMONY WHEREOF, I have hereunto signed my name officially and caused to be impressed hereon the Seal of State, at my office, in the City of Austin, Texas, this the 29th day of May, A. D. 1913.

(Seal) JOHN L. WORTHAM,
Secretary of State.

Judge Kennerly: I want to object to the offer of that evidence at this time, because I did not understand at the time that it was offered. I object to the offer of the evidence for the reason that it shows on its face that it is a compilation of the purported records of the office of the Secretary of State, a certificate given by him of what appears on the records, it being a compilation thereof, and not a certified copy of the records themselves. I will state that I think that under certain conditions the Secretary of the State might give a certificate, but I doubt whether this is gotten up in that shape. We make the further suggestion to the court that since that certificate has been offered, it presents a different question, and it is now a question of fact for the jury whether William Myers was or not a Notary Public, and we move now that

the court reconsider its action and admit the deed from Felder to Daniels, the certified copy of it.

The Court: You move to strike from the record the Secretary of State's certificate, and object to its admission, and move that I now receive the deed from Felder to Daniels, it now being presented as a question of fact for the jury?

Judge Kennerly: I want to bring this to the mind of the court: William Myer was at that time District Clerk, so that he is not an outside person, an interloper, not a man who was clothed with no authority to take an acknowledgment, but he is a man who was in office and was a kind of officer that the law usually clothed with authority to take acknowledgments, and who took it and who signed it as a Notary.

The Court: I overruled both motions. I withhold the ruling on the deed from Charles F. Felder to Joshua Smith. I have not passed on that yet. I will pass on that after all of the testimony is in the record.

Judge Kennerly: We read from the record on p. 396 the testimony of J. J. BEVIL beginning at the bottom of p. 396;

Q. You are the county clerk of Hardin County? A. Yes, sir.

Q. I will ask you whether or not this is Vol. P. of the Deed Records of Hardin County? A. Yes, sir.

Q. I wish you would please turn to page 561 of this record, and state what you find there, Mr. Bevil; what do you find on that page, the record of what instrument; what purports to be recorded on that page of that book?

Mr. Gordon: To save time, it purports to be the record of a deed from Charles A. Felder to William A. Daniel, pur-

porting to convey the Charles A. Felder league in Hardin County, Texas.

Q. Now, Mr. Bevil, I will ask you whether or nor this is Vol. X of the Deed Records of Hardin County? A. Yes, sir.

Q. Turn to page 227 and state what purports to be recorded on page 227 of Vol. X? A. It purports to be a deed from William A. Daniels to Thomas J. Word, dated February 5, 1855, conveying the Felder league.

Q. Now, that is a certified copy from Tyler County recorded in Hardin County by deed recorded in Tyler County. Vol. B. at page 556? A. Yes, sir.

Judge Kennerly: We offer from Book P p. 561 of the Deed Records of Hardin County the record of the deed from Felder to Daniels as a circumstance.

The Court: You may consider that as offered now.

Mr. Gordon: We object to this deed for the reasons already stated to the certified copy of the same reputed instrument, and in addition thereto we make the following objections: First, because no predicate has been laid for its introduction; second, because it is a transcribed copy of a copy from the County Clerk's office of Tyler County, and was spread on the records of Hardin County July 26, 1890. Third, because it is incompetent to prove any issue in this case and irrelevant and immaterial and selfserving.

Judge Kennerly: Do you object because I have not the record here.

Mr. Gordon: No, sir; we will consider that it is the record.

The Court: You offer it as a circumstance to prove claim

under the deed, as a circumstance to prove the existence of the deed?

Judge Kennerly: Yes, sir. The record also shows that the deed was spread on the records of Hardin County July 26, 1890.

Objection sustained.

Defendants except.

Judge Kennerly: I will read further from Mr. Bevil's testimony.

Judge Kennerly: We offer the contents of what is spread on p. 227 of Vol. X of the Deed Records of Hardin County as a circumstance to show the execution of the deed from Daniels to Word, and as a circumstance of claim.

The Court: That deed has been offered in evidence and received. You want to make proof of the fact that the deed from Daniels to Word executed in 1855 was recorded in Hardin County?

Judge Kennerly: It was spread on the records of Hardin County July 11, 1900.

The Court: Do you object to it.

Mr. Whitaker: We make the same objections.

The Court: I will overrule the objections and let the record show that it went to record in 1900. These two pieces of evidence are admitted by the court, not for the purpose of showing the execution of the deeds, but for the purpose showing the deeds went to record in Hardin Co. I merely admit the fact that they made a record there. You object for the reasons stated, and I overrule the objection and you reserve an exception.

373

Defendants next offered in evidence certified copy of deed from Thomas J. Word to George F. Moore, dated December 8, 1858, recorded in the Deed Records of Hardin County in volumes B and D, said deed conveying for the consideration of \$20,000.00 paid by George F. Moore of Nacogdoches County, Texas, among other lands an undivided one-half interest in the Charles A. Felder and D. C. Montgomery leagues among other lands, which deed contained a clause of general warranty, and was duly acknowledged by T. J. Word before A. G. Cantley, County Clerk of Anderson County, Texas, on December 28, 1858, and was filed for record in the Deed Records of Hardin County, Texas, on the 11th day of December, 1850.

Defendants next offered in evidence certified copy of deed from Thomas J. Word to Susan Moore, dated July 5, 1866, which instrument recited the previous conveyance from said Susan Moore by her attorney in fact, Reuben A. Reeves, to the said T. J. Word, and conveyed to the said Susan Moore all the right, title, interest and claim of the grantor in and to among other tracts of land the league of land granted to D. C. Montgomery on or about the 29th of August, 1835, and the league of land granted to Charles A. Felder on or about the 29th day of August, 1835, which instrument contained a clause of warranty in favor of said Susan Moore against all parties whomsoever claiming, by, through and under the said T. J. Word, and was duly acknowledged by him before B. F. Broyles, Chief Justice of Anderson County, Texas, on July 5, 1866, and was filed for record in the Deed Records of Tyler County on May 20, 1867.

Mr. Lee: We next offer in evidence certified copy of General Warranty deed from the records of Hardin County, said deed being from Geo. F. Moore and wife, Susan Moore, to John P. Irvin, dated August 4, 1881, filed for record in Hardin County May 11, 1882, and recorded in Book J, pp. 485 to 487, and conveys the entire Chas. A. Felder league of land, the consideration being \$30,807.00, and the deed conveys other land as well.

Mr. Lee: Defendants offer in evidence certified copy from the records of Hardin County of a General Warranty deed from E. A. Irvin to John P. Irvin, dated December 26, 1889, filed for record in Hardin County December 26, 1889, and recorded in Book P, pp. 229 to 231, recites a consideration of \$57872.72 and conveys other land as well as the Felder league.

Mr. Lee: Defendants offer in evidence certified copy from the records of Hardin County of a deed from John P. Irvin to the Texas Pine Land Ass'n, and its trustees, dated December 11, 1891, filed for record in Hardin County December 26, 1891, and recorded in Book T, pp. 402 to 407, recites a consideration of \$334,220.00, and conveys the Chas. A. Felder league Hardin Co. and 16 other tracts of land.

Judge Kennerly: We now offer portions of the deposition of JOHN P. IRVIN commencing on p. 124 of the printed record in the Pollard case.

We offer the 1st, 2nd, 3rd, 4th, 5th, 6th, 7th, 8th, direct interrogatories and answers, and the 1st, 2nd, 3rd, 4th and 5th cross interrogatories and answers. This deposition was taken August 17, 1908.

Interrogatory No. 1:

What is your name, age and place of residence?

Answer to Interrogatory No. 1:

John P. Irvin; aged 63 years; residence 5745 Calumet Avenue, Chicago, Illinois.

Interrogatory No. 2:

This suit involves a portion of the Charles A. Felder league in Hardin County, Texas. Have you any personal knowledge of this survey? If yes, state when and how you acquired such knowledge.

Answer to Interrogatory No. 2:

I have personal knowledge of the Charles A. Felder league in Hardin County, Texas. Have been on it frequently from 1880 to 1890.

Interrogatory No. 3:

State whether or not you ever had a business transaction concerning this survey? If yes, state with whom you had such transaction.

Answer to Interrogatory No. 3:

I had a business transaction concerning this survey buying the same from George F. and Susan Moore of Austin, Texas, and conveying the same later.

Interrogatory No. 4:

The deed records show that you bought this property from Geo. F. Moore and Susan Moore on August 4th, 1881, by deed, which was filed for record in Hardin County, Texas, on May 11th, 1882. Please state whether or not you bought this property as indicated by said records.

Answer to Interrogatory No. 4:

I bought this property as indicated by said records.

Interrogatory No. 5:

If in answer to the foregoing interrogatory you say that you purchased the property from Geo. F. Moore and Susan Moore as above stated, then state:

(1) Whether or not the conveyance to you was a *bona fide* sale and state for what purpose you purchased the property.

(2) State what sum of money, if any, you paid to Geo. F. and Susan Moore for said land as a consideration for the deed above mentioned.

Answer to Interrogatory No. 5:

The conveyance from George F. Moore and Susan Moore was a *bona fide* sale. I purchased the property for its timber value. The sum of money paid George F. and Susan Moore was, I think, the same as consideration in the deed, \$30,807.00.

Interrogatory No. 6:

The deed records show that you sold this property to E. A. Irvin on May 5th, 1882, by deed duly recorded in Hardin County, Texas, May 2nd, 1883. Please state whether or not you sold this property as indicated by said records?

Answer to Interrogatory No. 6:

I sold this property as indicated by said records to E. A. Irvin.

Interrogatory No. 7:

If in answer to the foregoing interrogatory you say that you sold the property to E. A. Irvin as above stated, then state:

(1) Whether or not the conveyance to him was a *bona fide* sale and state for what purpose he bought the property.

(2) State what sum of money, if any, he paid to you for said land as a consideration for the deed above mentioned.

Answer to Interrogatory No. 7:

It was a *bona fide* sale and for the timber value. In the deal with E. A. Irvin there was included besides the Moore lands, other lands, ten to fifteen thousand acres. The whole consideration was from \$55,000 to \$60,000. E. A. Irvin furnished the money in cash and the title was in him. I had a contract from him for a half interest in the same and some years after, as the records will show, I bought him out entirely.

Interrogatory No. 8:

Ellen Lee Mason claims 1850 acres of this survey and asserts her title under what purports to be a deed, dated June 18th, 1839, from Charles A. Felder, conveying said league of land to John A. Veatch.

Concerning the conveyance from Charles A. Felder to John A. Veatch, please state, whether or not on August 4th, 1881, when you accepted the deed from Geo. F. Moore and Susan Moore to said league of land, you had any actual notice of said deed from Felder to Veatch.

Answer to Interrogatory No. 8:

I do not remember any actual notice of deed from Felder to Veatch, at time I accepted deed from George F. and Susan Moore to said league of land, Col. P. A. Work may have mentioned the matter, but I do not remember of his having done so.

Cross Interrogatory 1:

State the attorney or attorneys, giving names and ad-

dresses to the best of your knowledge, who examined or assisted in the examination for you of the title to the land in question, at the time you claim to have purchased it.

Answer to Cross Interrogatory 1:

Col. P. A. Work, of Hardin, Hardin County, Texas.

Cross Interrogatory 2:

State who prepared for you, in whole or part, the abstract or abstracts of title to said land, upon which the title was examined by you or by your attorneys of such person or persons to the best of your knowledge.

Answer to Cross Interrogatory 2:

I do not remember of having any abstracts of title to said land at time of purchase from Moore. If any abstract, or opinion, it was from Col. Work.

Cross Interrogatory 3:

What has become of said abstract or abstracts of title and what has become of the opinion or opinions given by said attorneys on said title so far as you know or have reason to believe? What did you do with them? In whose hands are they probably now? Did they or not pass down to the successive purchasers? Is that your understanding of the matter?

Answer fully.

Answer to Cross Interrogatory 3:

Any abstracts of title or opinions as far as I know when (went) into the hands of the Texas Pine Land Association through John H. Kirby of Houston, Texas, he having been interested to some extent in that deal and his firm, Lanier & Kirby, had, I believe, much to do with getting up abstracts and passing on the titles to the land sold the Texas Pine Land

Association of which the Charles Felder league was a part. I suppose all abstracts of title passed down to successive purchasers. John H. Kirby should know.

Cross Interrogatory 4:

How was the consideration from you to your vendors for their deed in question actually paid? How much in money and how much in other and what ways, and how long after the acceptance of the deed from them was it before you completed the purchase payment? Declare fully, etc.

Answer to Cross Interrogatory 4:

Consideration paid in cash, no other consideration. A comparatively short time; deeds and records will show.

Cross Interrogatory 5:

How was the consideration from Edward A. Irvin to you and your wife, Nellie B. Irvin, or either, for your deed to him in question actually paid? How much in money and how much in other and what ways and how long after the acceptance of the deed from you was it before he completed the purchase payments to you? Declare fully, etc.

Answer to Cross Interrogatory 5:

Consideration paid in cash and in time to meet and cover my obligations for the Moore and other lands conveyed to E. A. Irvin; the transaction was completed in a comparatively short time; and as I mentioned before E. A. Irvin advanced the money, \$55,000 to \$60,000; and upon my conveying the lands to him, entered into a contract with me by which I had a half interest in the same or in the profits of the same, if operated or sold. Later, some years after, I bought him out bodily of all his interest in Texas. The cash consideration in the deed from myself and wife to E. A. Irvin was \$46,000,

this includes the 41,076 acres bought from Moore and wife, August 4, 1881, and also other leagues purchased by me later from the heirs of T. J. Word. The deeds of record will show all these transactions correctly. I may have been mistaken in mentioning the consideration, \$55,000 to \$60,000, through including in my mind other lands, taxes and expenses in my business with E. A. Irvin; but the deeds and records are correct and will show the facts.

Mr. Lee: We next offer in evidence certified copy from the deed records of Hardin County a release of a vendor's lien from E. A. Irvin to, the Texas Pine Land Ass'n dated April 28, 1897, recorded in Vol. S, p. 481, reciting the satisfaction of a vendor's lien retained by the grantor therein.

Mr. Lee: We next offer in evidence certified copy of a deed from the Texas Pine Land Ass'n to the Houston Oil Co. of Texas, dated July 31, 1901, and filed for record in Hardin County, August 17, 1901, conveying the Chas. A. Felder league, and recorded in Vol. 6 pp. 159 *et seq.*, the deed reciting a consideration of one dollar and other valuable considerations.

Mr. Lee: Defendants offer in evidence certified copy of a deed from N. B. Scott to the Texas Pine Land Ass'n, dated April 6, 1898, filed for record in Hardin County April 6, 1898, filed for record in Hardin County April 6, 1898, and recorded in Vol. U pp. 183 *et seq.*, said deed conveying all the land conveyed to said Texas Pine Land Ass'n in a deed made by John P. Irvin on the 11th of December, 1891.

Mr. Lee: Defendants offer in evidence declaration of trust by the Trustees of the Texas Pine Land Ass'n dated October 23, 1889, filed for record May 31, 1890, and recorded

in Vol. R, pp. 377 *et seq.* It is a certified copy from Hardin County.

Mr. Lee: Defendants offer in evidence declaration of trust of the trustees of the Texas Pine Land Ass'n, dated September 19, 1892, filed for record in Hardin County March 6, 1893, recorded in Vol. R, pp. 151 *et seq.*, said instrument being a certified copy from the records of Hardin County.

Mr. Lee: Defendants offer in evidence certified copy of declaration of trust by the trustees of the Texas Pine Land Ass'n, dated June 28, 1894, filed for record in Hardin County August 10, 1894, and recorded in the deed records of said county Vol. R, pp. 406 *et seq.*

Mr. Lee: Defendants offer in evidence original declaration of trust by the trustees of the Texas Pine Land Ass'n, dated June 29, 1898, filed for record July 17, 1914, and recorded in Vol. 48, pp. 153 and 154 of the deed records of San Augustine County.

Judge Kennerly: We offer from the printed record in this case on p. 514 the testimony of Mr. A. B. DOUCETTE. That is, that part which I shall read beginning on p. 514. I read the first two questions and answers and then skip to the last question on that page.

Q. Have you any business, avocation or profession, if so, what is it? A. I am a practical surveyor and timber estimator by profession.

Q. Do you know the Felder league of land as located on the ground? A. Yes, sir.

Q. Did you ever cut any timber off of this league or sell the timber off of this league to anybody? A. John P. Irving sold the timber off of the Felder to a man by the name of

Perry Sacher, but he lived on the D. C. Montgomery league. This was his place of residence.

Q. Do you remember having sold for John P. Irving any deadened cypress timber off of this league to anyone and did they pay any money to you or not? A. I do not remember, there was some deadened cypress timber about one mile or two-fifths of a mile easterly from Cane's Ferry, but I don't know how it was disposed of.

Q. Did you not cut off the pine timber for yourself or some one else or have it done? A. I can remember that Sacher is one man I know of who cut off the Felder and put in timber in about forty different places during five or six years.

Q. You never came to Texas until 1877? A. No, I got into the United States in 1865.

Q. Well, when did you first begin to operate in the timber business in Hardin County, Texas? A. I think in 1879, the fall of 1878, or spring of 1879.

Q. Prior to that time you had very little acquaintance in Hardin County? A. I first entered in Hardin County with Major Seale, it was in the fall of 1878, I went to Hardin and tried to buy some timber from Major Seale on Village Creek and I contracted with the Jordan brothers, who lived in Honey Island, and Ben Jordan to put timber in.

Q. Did you represent John P. Irving as agent or otherwise? A. I became an employe of John P. Irving in February, 1885. I took the business held by J. J. Copley previous to that.

Q. What were your duties? A. Well, just to keep the lines open, keep off trespassers off of the land, lease to squatters, if any, sell enough timber to pay the taxes and expenses every year.

Q. Well, did you ever pay any taxes for John P. Irving on the Felder league, if so, what years and how long?

A. I paid the taxes for Irving from 1885 until 1894, until it was sold to the Texas Pine Land Association, during that time I think E. A. Irving probably paid part of the taxes in Tyler County, Jasper and Sabine County, Texas. But I bought all of the necessary scrip that could be bought in that kind of money for Irving in five counties, Hardin, Jasper, Sabine, and Angelina, of course the Felder being amongst the several leagues in Hardin County, the taxes were paid in bulk as nearly as practicable.

Q. Were they paid each year they accrued or not? A. Yes, they were.

Q. Who was on that land when you took charge for John P. Irving besides the family at the ferry? A. That was all the people I knew.

Q. Was anybody on it at the time you took charge of the timber you sold to the Texas Pine Land Association?

A. No, there was some young men on the league around the creek during fishing season and in the winter time, they did some trapping in there. Everybody could fish all they wanted to on the creeks.

Q. Do you know who claimed to be the owner of that league from the time you took the business for John P. Irving up to the present time; whether they claimed it open or not? A. Irving bought from Judge Moore and Word at Austin.

Q. Now, except Judge Moore, John P. Irving and Word, Texas Pine Land Association and Houston Oil Company of Texas, who, if anyone, within your knowledge has asserted ownership or title? A. No one that I know of except

Frank Womack; he set up title to about six hundred and forty acres which lay about three-fourths of a mile east of Cane's Ferry.

Q. He was sued by the Texas Pine Land Association and defeated, was he not? A. During my time he tried to hold some timber there, but Mr. Irving stopped him. I would not say whether any compromise was made with him or not.

Q. Womack at the time this controversy came up lived at the ferry, did he? A. He lived at Pine Island, just now known as the town of Voth.

Q. How far is that from this league? A. It is six or eight miles south of the league.

Q. Then Womack did not succeed with his claim? A. Not so far as I know.

Q. What year was it he set up that claim, do you recollect? A. I think it was about 1887 or 1888.

Judge Kennerly: We read from the same record, p. 394, the testimony of L. G. ROBERTS, beginning near the bottom of the page.

Q. Where do you live? A. In Hardin County.

Q. How long have you lived in Hardin County? A. Forty years.

Q. Please state whether you were ever sheriff and tax collector of Hardin County? A. Yes, sir.

Q. From what year to what year? A. From 1894 to 1906.

Q. Twelve years? A. Yes, sir.

Q. I will ask you if you remember during that time of

the payment of any taxes by the Texas Pine Land Association? A. Yes, sir.

Q. Do you remember the payment of taxes to you as collector by the Houston Oil Company of Texas? A. Yes, sir.

Q. I will ask you to state whether or not the Texas Pine Land Association and the Houston Oil Company of Texas regularly paid on land claimed by them, paid the taxes?

Q. Did they, or did they not? A. Yes, sir; they did.

Q. State whether or not they paid all taxes on land paid by them for each and every year during the time you were tax collector? A. My recollection is that I never had any trouble in collecting their taxes.

Q. State whether or not you have any recollection of their not having paid their taxes and become delinquent? A. No, sir.

Q. State whether or not you have any recollection of any of their land having been sold for delinquent taxes? A. No, sir.

Q. If any of their land had been sold for taxes during the time you were sheriff and tax collector, you would have known of it? A. Yes, sir.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You don't have any independent recollection of whether they paid any taxes on this tract of land? A. No, sir; I don't remember about that.

Q. Independently as a general proposition you don't remember it? A. No, sir.

RE-DIRECT EXAMINATION.

Q. Do you remember as a matter of fact whether they were rendering and claiming the Charles A. Felder league? A. Yes, sir; that is my recollection.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Whether they paid any taxes on it, you don't know as an independent fact except that you know in a general way about their renditions of taxes generally? A. That is all. I don't know for sure.

Mr. Lee: We next offer in evidence tax receipt 682 from L. G. Roberts, Tax Collector of Hardin County, Texas, dated April 13, 1895, to the Texas Pine Land Ass'n, in payment of State and County taxes for the year 1894 on certain property among which is given Abstract No. 21, C. A. Felder league 4428 acres of land.

Mr. Lee: We next offer in evidence tax receipt issued November 18, 1902, by L. G. Roberts, Tax Collector of Hardin County for the taxes due by the Texas Pine Land Ass'n for the year 1895 on the property therein described, and including the C. A. Felder league.

Mr. Lee: We next offer in evidence tax receipt No. 208, dated April 13, 1897, issued by L. G. Roberts, Tax Collector of Hardin County, to the Texas Pine Land Ass'n showing the payment of State and County taxes for the year 1896 on the Chas. A. Felder league 4428 acres, Abstract No. 21 and other lands therein mentioned.

Mr. Lee: We offer in evidence tax receipt No. 96, dated January 18, 1898, issued by L. G. Roberts, Tax Collector of

Hardin County, to the Texas Pine Land Ass'n acknowledging receipt of payment of taxes for the year 1897 on the Chas. A. Felder league and other lands.

Mr. Lee: We offer in evidence tax receipt No. 141, issued by L. G. Roberts, Tax Collector of Hardin County, January 23, 1899, to the Texas Pine Land Ass'n in payment of the State and County taxes for the year 1898 on the Charles A. Felder league and other lands.

Mr. Lee: We offer in evidence tax receipt No. 129, issued by L. G. Roberts, dated January 31, 1900, to the Texas Pine Land Ass'n in payment of the State and County taxes for the year 1899 on 4428 acres of the Charles A. Felder league and other lands.

Mr. Lee: We offer in evidence tax receipt No. 129, issued by L. G. Roberts, Tax Collector of Hardin County, Texas, dated Jany. 24, 1901, to the Texas Pine Land Ass'n in payment of taxes for the year 1900 on 4428 acres of the Charles A. Felder league and other lands.

Mr. Whitaker: You said 4428 acres, altogether it is 4410 acres.

Mr. Lee: We next offer in evidence tax receipt by L. G. Roberts, Tax Collector of Hardin County, dated April 18, 1903, to the Houston Oil Co. of Texas showing payment of the taxes for the year 1902 on the Chas. A. Felder league of land, 4428 acres and other lands.

Mr. Lee: We offer in evidence tax receipt issued by L. G. Roberts, Tax Collector of Hardin County, Texas, for the year 1903. It is to the Houston Oil Co. of Texas and shows payment for the year 1903 of the State and County taxes on 4411 acres of the Chas. A. Felder league, in Hardin County.

Mr. Lee: We offer in evidence tax receipt No. 141, issued by L. G. Roberts, Tax Collector of Hardin County, to the receivers of the Houston Oil Co. of Texas in payment of taxes for the year 1904. There is no date on this receipt but the amount paid was on 4411 acres of the Chas. A. Felder league and other lands.

Mr. Lee: We offer in evidence tax receipt signed by L. G. Roberts, Tax Collector of Hardin County, dated January 24, 1906, to the receivers of the Houston Oil Co. of Texas and showing payment of taxes for the year 1905, on 4411 acres of the Chas. A. Felder league.

Mr. Lee: We offer in evidence tax receipt from W. W. McConico, Tax Collector of Hardin County, dated January 31, 1907, to the receiver of the Houston Oil Co. of Texas, and showing the payment of taxes for the year 1906, on 4411 acres of the Charles A. Felder league and other lands.

Mr. Lee: We offer in evidence tax receipt from W. W. McConico, Tax Collector of Hardin County, dated January 30, 1908, to the receivers of the Houston Oil Co. of Texas, in payment of State and County taxes for the year 1907 on 4411 acres of the Charles A. Felder league and other lands.

Mr. Lee: We offer in evidence tax receipt No. 395 issued by W. W. McConico, Tax Collector of Hardin County on January 28, 1908, to the Houston Oil Co. of Texas in payment of the State and County taxes for the year 1908 on 4411 acres of the Charles A. Felder league and other lands.

Mr. Lee: We offer in evidence tax receipt No. 238, issued by W. W. McConico, Tax Collector of Hardin County, dated January 28, 1910, to the Houston Oil Co. of Texas, in

payment of State and County taxes for the year 1909 on 4411 acres of the Charles A. Felder league.

Mr. Lee: We offer in evidence tax receipt No. 408, issued by W. W. McConico, Tax Collector of Hardin County, Texas, January 25, 1911, to the Houston Oil Co. of Texas in payment of State and County taxes for the year 1910, on 2578 acres of the Chas. A. Felder league and other lands in Hardin Co.

Mr. Lee: We offer in evidence tax receipt No. 425, issued by W. W. McConico, Tax Collector of Hardin County, January 26, 1912, to the Houston Oil Co. of Texas, showing the payment of State and County taxes for 1911 on 2578 acres of the Charles A. Felder league and other lands in Hardin Co.

Mr. Lee: We offer in evidence tax receipt issued by W. W. McConico, Tax Collector of Hardin County, November 11, 1912, to the Houston Oil Co. of Texas, showing the payment of State and County taxes for the year 1912 on 2578 acres of the Charles A. Felder league in Hardin County.

Mr. Lee: We offer in evidence tax receipt issued by W. S. Parker, Tax Collector of Hardin County, Texas, dated October 20, 1913, to the Houston Oil Co. of Texas, showing the payment of State and County taxes for the year 1913 on 2578 acres of the Charles A. Felder league in Hardin County.

Judge Kennerly: I read from the printed record p. 400, which refers to the tax receipt dated July 28, 1866, showing the payment of taxes on a number of tracts of land in Hardin County, and among which appears the Chas. A. Felder league, and the receipt is signed by James Majors, Assessor and Collector of Anderson County.

Mr. Lee: We offer in evidence certified copy of the order appointing the receivers of the Houston Oil Co. of Texas, dated March 17, 1904, duly certified by the clerk of the United States District Court for the Southern District of Texas.

Mr. Lee: We offer in evidence certified copy of the order continuing Charles Dillingham as sole receiver of the Houston Oil Co. of Texas, dated November 1, 1906, said copy being duly certified by the clerk of the United States District Court for the Southern District of Texas.

Mr. Lee: We offer in evidence duly certified copy from the clerk of the United States District Court for the Southern District of Texas of the decree of said court discharging Chas. Dillingham as receiver of the Houston Oil Co. of Texas, dated April 15, 1909.

Judge Kennerly: It is agreed that the taxes for the year 1903 on the Felder league were paid by the Houston Oil Co. of Texas May 9, 1904, and that the taxes for 1904 were paid in January 18, 1905, as shown by the receipts offered in evidence.

J. C. DEAN, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. What is your occupation? A. Photographer.

Q. Where do you live? A. At Beaumont.

Q. Were you asked to go to any place recently and take some pictures of a sand pit? A. Yes, sir.

Q. Tell the jury where you went and when? A. I went on the 16th of this month to Fletcher on the Santa Fe and

made a number of negatives of the sand pit right across from the station of Fletcher.

Q. How many did you make? A. Four plates.

Q. This work was done and the plates made at the request of whom? A. Mr. Kennerly, I don't remember the other gentleman's name. Mr. Lee I believe.

Q. Myself, Mr. Lee and Mr. McClellan were present?
A. Yes, sir.

Q. Was there anybody else there before we left? A. Yes, sir.

Q. Who was it? A. I only recognized Judge Easterling.

Q. Now, I exhibit to you first what we have denominated No. 1, and I ask you to examine that and state whether or not that is one of the photographs you took? A. Yes, sir, it is one that was made there.

Q. On the side of the track looking towards the pit on the south side of the railroad track, on the Fletcher side looking towards the pit and bringing in the old house that was on the edge, of it? A. Yes, sir.

Q. When that was taken you put your camera east of the railroad track how far? A. It was about 17 steps.

Q. Was that taken from the west or east side? A. This was made on the side of the track the station was on.

Q. On the right hand side as you go out? A. Yes, sir.

Q. You put the camera on the right hand side and 17 steps from the track? A. Yes, sir.

Q. That is a photograph of part of the pit and the house is it? A. Yes, sir.

Q. That is a correct photograph? A. Yes, sir.

Q. You took it yourself and developed it yourself? A. Yes, sir.

Judge Kennerly: We offer that photograph in evidence.

Q. You took that across the track? A. Yes, sir.

Mr. Whitaker: That is a view you have taken where the camera was on the right hand side, and the view was on the left hand side of the track going north?

The Witness: Yes, sir.

Q. Now, I hand you photograph No. 2 and ask you if you also took that, and ask you to explain to the jury where your camera was situated when you took that view? A. I made this plate at the same time the other one was made. This was made from a point in the sand pit where there had been a platform in the sand pit; it run out there where they loaded the sand on the cars, and this picture looked out here this way.

Q. This a correct photograph you made there? A. Yes, sir.

Q. You took this photograph yourself and developed it yourself? A. Yes, sir.

Q. That was taken looking rather towards the water tank? A. Yes, sir. It shows the water tank in the picture and the same houses shown in the other picture.

Q. How many excavations did you see there, separate and distinct excavations? A. These two photographs represent the same excavations.

Q. Do those two photographs represent the excavations nearest the Santa Fe Railroad? A. No, sir; this is only one section of it. The J section don't show in that at all.

Q. Did you take the entire excavation that was still there on the Santa Fe track? A. Yes, sir; I made two different plates. There were excavations further away than that.

Q. I hand you photograph No. 3 and ask you where that was taken, looking in what direction, towards the track or away from the track? A. This was looking away from the track altogether.

Q. That is from the Santa Fe track? A. Yes, sir.

Q. Is that the same excavation that appears in 1 and 2? A. No, sir; this is different altogether.

Q. It is furthest from the railroad? A. Yes, sir.

Q. Now, then, that was correctly taken? A. Yes, sir.

Q. You took it yourself and developed it yourself? A. Yes, sir.

Judge Kennerly: We offer Nos. 2 and 3 in evidence.

Q. You have made another photograph No. 4? A. Yes, sir.

Q. I now hand you No. 4? A. This was made from the other end of the excavation looking towards No. 2.

Q. Looking towards the Santa Fe railroad? A. Yes, sir.

Q. And is the same excavation as No. 3? A. Yes, sir, partially so. This is the other end of the excavation Nos. 2 and 3.

Q. No. 4 is one end of the other excavation? A. Yes, sir.

Q. And No. 3 is the other end? A. Yes, sir.

Q. This photograph was correctly made and you developed it yourself? A. Yes, sir.

Judge Kennerly: We offer it in evidence.

Q. I want to ask about No. 2. Here is extending out in the photograph what appears to be the stump of a tree, and there appears to be a man standing by that. Just explain how

that was taken and who that man is? A. That was Mr. McClellan; I think that is his name.

Q. How near to that tree was he standing? A. About three feet. He was standing to the side of it as near as I could judge.

Q. What are those things in there, does that or not represent the original work on the ground? A. I guess that is the top of the tree.

Q. I will ask you who the gentleman is that appears to be standing right there? A. That is Mr. McClellan.

Q. Did you know where he was standing, what distance from the track he was standing? A. He was standing right there where it shows; he was standing on the outer border of the railroad right-of-way.

Q. This old house shown in the picture is there now? A. Yes.

Q. Now, did you go with any person to the house shown in picture No. 2? A. Yes, sir.

Q. Do you remember who was living there? A. There was a colored man there.

Q. Do you remember his name? A. If I remember right now, it was Abe; I think that was what he was called.

Q. You think Abe was living in that house? A. Yes, sir.

Q. Now in picture No. 3, there is shown a man to be about half way down the bank; who is that man? A. Mr. McClellan.

Q. Where was he standing in reference to the bottom of the bank or the top of the bank? A. He was standing a little nearer the top than the bottom of the bank. He was not standing in the middle of it.

Q. How high are those banks there approximately, giving the highest and lowest? A. Well, I should say the bank was 28 to 30 feet. That is merely an estimate; I did not measure it of course.

Q. I will ask you what are those things in the center of picture No. 3 there? A. Two railroad tracks. They look to be narrow gauge tracks.

Q. In taking No. 3 you spoke about the place where the railroad tracks entered the excavation? A. Yes, sir.

Q. You took the photograph from across this way? A. Yes, sir.

Q. About how far was it across there from where you set your camera to Mr. McClellan? A. I guess about 100 yards.

Q. Now, No. 4 is a part of the same excavation as No. 3? A. Yes, sir, that is true.

Q. Who are the gentlemen sitting down right here? A. That is Mr. McClellan right there.

Q. You took the picture from the furthest side of that excavation, from the Santa Fe Railroad? A. Yes, sir.

Q. Where were these gentlemen sitting down with reference to the entrance of the excavation? A. They were just about at the entrance.

Q. How far were you from them, how far was it across there from where your camera was sitting to where these gentlemen were sitting? A. 125 yards.

Q. 125 yards? A. Yes, sir.

Q. Did you observe the conditions there; I will ask you whether or not this was a natural excavation or whether it was caused by taking out the sand? A. It evidently looked as though it was excavated.

Q. Scraped out? A. Yes, sir.

Q. You would observe a collection of roots and trees there? A. Yes, sir.

Q. Pictures Nos. 3 and 4 give all the excavations further from the railroad? A. No, sir; they do not.

Q. Why didn't you take more pictures? A. I did not have more plates: They asked me to take four and I only took four plates with me.

Q. You did not have the plates with you to take more pictures? A. No, sir.

Q. You were asked to make more after you got there, but you did not make them because you did not have the plates with you? A. No, sir.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You are an expert photographer? A. Yes, sir. I presume I could claim to be.

Q. I will ask you if it is not a fact that the art of photography is capable of causing a scene very large or very small, appearing very large or very small, as the photographer may desire to make it appear? A. Yes, sir, with certain lens that is a fact.

Q. Was this as accurate as a man could view the scene? A. Well, of course the size of the picture depends on the lens used.

Q. The eye is ordinary considered to be a normal lens? A. Yes, sir.

Q. The photographic lens may vary from great abnormality to normal? A. Yes, sir; that is true.

Q. You don't regard, do you, an ordinary perspective

through a photographic lens as reliable? A. Well, it is the only reliable way we can make it.

Q. What I want to establish is this: If it is not a fact that you can take an acre of land and make it over an acre of land, it being dependent on the character of lens you use?

A. Yes, sir, that is a fact.

Q. And take a large body of land and make it practically an acre of land? A. No, sir; you can not do that. You take what we term a wide angle lens—that is an angle intended to get close to an object and photograph it, that will cut in at an angle of nearly 90 degrees, and that will make the object out of proportion to the size as it actually exists. It will also give a distance view that is four to five times the natural distance of it. What is termed a rettilineal lens will give as correct a normal distance as it is possible for a lens to give.

Q. Now, taking for instance your scene reflected in photograph No. 2, without knowing what was on the ground and merely seeing this photograph, is it not a fact that you could not form anything like an accurate idea of the actual area embraced in the limits of that picture? A. Well, I don't know. I should think a man ought to be able to tell pretty well about the area there.

Q. I will ask you to give your opinion of the area actually embraced in this picture which you say does not embrace all of that pit? A. Well, I am not good at judging anything of the kind. I have never had occasion to. I will say two acres are embraced in that picture.

Q. If a certain party made a survey of it and measured it and showed there was 94-100 of an acre, you would be surprised, would you not?

Judge Kennerly: We object to that question because it

assumes something not in evidence. There is no evidence of a survey having been made.

Objection overruled.

Defendants except.

Q. You would be surprised if an actual survey disclosed the fact that there was only 94/100 of an acre in that excavation, would you not, in what is shown there? A. Yes, sir, I would.

Q. Your picture does not take it all in? A. No, sir.

Q. You say that in your judgment what is embraced in the picture is about two acres, and that the picture does not show it all. How much did you leave out? What proportion did you leave out of the picture? A. I could not say because I did not notice the other part of it at all.

Q. Approximately, Mr. Dean? A. I really did not pay any attention to it because I was not asked to photograph it.

Q. Did you leave out a third? A. I really don't know because I did not look out there at all.

Q. That appeared to be a recent excavation, did it not, part of that pit? A. Yes, sir.

Q. What part? A. Right immediately underneath here.

Q. That is picture No. 2? A. Yes, sir. The lower part of the pit shows to have been recently worked on.

Q. You mean where the shovel is and where the wheelbarrow is? A. Yes, sir.

Q. What proportion does that bear to the balance of the picture? A. Well that would be rather hard to estimate.

Q. Would you say as much as a third? A. No, sir. I should not think so; I should not think more than a sixth.

Q. It looks like it is nearly a half, does it not? A. That is because it is close to it of course.

Q. Is not that one of the imperfections of photography?

A. No, sir, it is merely the perspective given by the lens.

Q. Does it carry to the observer of the picture the impression that it is much greater in area than it actually is? A. No, sir, not the way I look at it. I have been accustomed to look at photography that way.

Q. Well, to the ordinary layman that may be? A. I could not say as to that. I am accustomed to looking at the pictures and not thinking of anything else.

Q. Now, Mr. Dean, you are mistaken are you not when you say the depth from the surface down to the bottom of the excavation is something like 28 to 30 feet on an average?

A. I said at the far side, the edge of the far pit.

Q. I did not understand you? A. Yes, sir, that was at the far pit.

Q. The far edge of the second pit? A. Yes, sir.

Q. Now, is it not a fact that the pit shown in No. 1 and No. 2 shows an average of from five to 20 feet as the height of the original deposit of sand? A. Nos. 1 and 2?

Q. Yes, sir, that is No. 1 I show you and here is No. 2? A. Well, I would state from my recollection of it that it is nearer 20 to 25 feet in depth from here to the bottom of the excavation.

Q. You don't know how much of that was excavated prior to the filing of the suit? A. No, sir, I don't know anything about that at all; I know nothing about it until I made the pictures.

Q. Assuming that picture No. 1 is a picture of the house

that Mr. Carroll built, does that faithfully portray the house as it stands now? A. Yes, sir, that side of it shows there.

Q. Was there anybody occupying that house when you were there? A. They said a man was batching there. I saw part of a bedstead through an opening there. I did not meet anybody there at all.

Q. Now the pictures 3 and 4 represent the second excavation lying back to the west of the first? A. Well, I don't know the directions; I did not pay any attention to that. That is probably correct, may be a little northwest; I don't know the directions. That is farthest away from the station, the railroad.

Q. You don't know that the bulk of this pit was excavated after this suit was filed? A. No, sir, I don't know anything about the suit or anything about when it was filed.

Q. Is it not a fact that this simply appears to be a sand bank in there, and that underneath the deposit of sand on top of the ground is a natural soil or clay, and that the sand bank has been simply scooped up causing these excavations that don't show any clay or anything of the kind there below the surface at all; it was just a bed of sand lying there between the railroad and the creek? A. I did not see the creek.

Q. This is all on the west side of the railroad track is it not? A. It is on the left side going north alongside the railroad track.

Q. This is a little narrow-gauge track with old rusty rails, is it not? A. They seemed to be rusty and to have been out of use for some time.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. You were asked if this sand had been largely removed since this suit was filed; the suit was filed in 1911. These rails that he has just asked you about, did they appear to have been recently used? A. Not as far as I could notice; they did not look like they had been recently used.

Q. They were used some time back? A. Yes, sir.

Q. He asked you a good deal about the so-called impression and illusions of photography. I will ask you what was said to you about making a fair photograph of the two excavations? A. I was asked by Mr. Kennerly to make as fair a representation of the sand pits as could be made by photography.

Q. Did you or not do that? A. Yes, sir, to the best of my ability.

Q. Did you have anything on there that would make it look farther than it was or nearer than it was? A. No, sir, I did not. When I was through making the exposures I was asked if that was as near a correct representation as I could make and I told them it was.

Q. In reference to selecting the positions from which the pictures could be made, what was said and done about that? A. I was asked to make them from the points that would show as much of the excavation part of it as possible and to get a fair representation of it.

Q. You did take all that you could? A. Yes, sir.

Q. About how much was that; I don't mean in acreage, but whether 1/10 or 1/4 or how much of the pit or excavation nearest to the railroad did you take or is included in photo-

graphs Nos. 1 and 2? A. Well, I really could not say because I did not examine the other part of it.

Q. About how much of the excavation farthest from the Santa Fe railroad is embraced in pictures No. 3 and 4?

A. About three-fourths.

Q. About three-fourths? A. Yes, sir.

Q. You were asked whether or not there were high banks there, and what the excavations showed. Tell us about that? A. Well, it shows very plainly that they had been excavating there; the lines of railroad had been run out at different places there and it showed some of the old ties still there.

Q. The ground at the top of those high banks was that the natural level of the ground in that vicinity or indicate that it had been built up like you would build a tank to hold water? A. No, sir, it was the natural ground because there were large trees around there.

Q. There were trees growing around the excavation?

A. Yes, sir.

Q. Were there any signs of dirt piled against those trees? A. No, sir.

Q. So those banks were caused by the taking out of the sand and not by piling up sand, is that correct? A. Yes, sir. I should say that is right.

Q. Did you go with the gentlemen you were in company with up the track towards Silsbee for the purpose of examining some more excavations? A. No, sir, I did not.

Q. You remained at the station? A. Yes, sir.

Q. Who did go up that way? A. Mr. Kennerly, Mr. Lee and Mr. McClellan.

Q. That was after you had exhausted your plates? A. Yes, sir.

Q. And were not able to take any more photographs? A. Yes, sir.

Q. You saw the ground and surroundings of the pictures you took, all four of them? A. Yes, sir.

Q. I will ask you if from examining those pictures aside from your work as a photographer, they are a fair representation of what is there on the ground? A. Yes, sir.

Q. As near as it could be made by photographs? A. Yes, sir.

(The four photographs are ordered sent up to the Appellate Court by the trial judge.)

H. A. WOODS, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Your name is H. A. Woods? A. Yes, sir.

Q. Where do you live? A. At Newton, Texas.

Q. You are a son of C. A. Woods? A. Yes, sir.

Q. What is your business? A. I am in the employ of the Houston Oil Co. as a surveyor.

Q. What training have you had in surveying and civil engineering, if any? A. Well, I have had a course in civil engineering at the A. & M. College of Texas.

Q. How long have you been engaged in surveying? A. Well since I came out of school and some before.

Q. When was that? A. In 1911.

Q. Have you had any experience in figuring and computing the dimensions of excavations; do you know how to do that? A. Yes, sir, I think I do.

Q. Lay aside your timidity and tell us whether you do or not? A. Yes, sir, I do.

Q. Were you called on by the Houston Oil Company of Texas to make a survey of the sand pits and excavations on the Charles A. Felder league in Hardin County? A. Yes, sir.

Q. Did you do that work? A. Yes, sir.

Q. When was that done? A. I believe it was on the 12th and 13 of this month (November).

Q. The 12th and 13 of November, 1914? A. Yes, sir.

Q. You went on the ground? A. Yes, sir.

Q. Who was with you? A. My father and Mr. McClellan and Mr. McMahan.

Q. Your father, C. A. Woods, and W. A. McClellan and John McMahan? A. Yes, sir.

Q. Did you make a survey of the Felder league or any part of it or the portion on which the excavations appear? A. I made a survey of the surrounding country around the creek there in the sand beds.

Q. I will ask you if you located the excavations or sand pits in reference to the boundary line of the Felder league? A. Yes, sir, I did.

Q. Which boundary line? A. The north boundary line of the Felder league.

Q. Did you make measurements? A. Yes, sir, I did. I measured from the north boundary line of the league to the sand pit or the distance between them.

Q. I will ask you whether or not you made up a plat showing the Felder league and the excavations you found thereon? A. Yes, sir, I did.

Q. (Shows paper to witness) Is this the plat? A. Yes, sir.

Q. Now, Mr. Woods, was that plat correctly made? A. It was made according to the measurements we took on the ground.

Q. Was it correctly made? A. Yes, sir.

Q. It is a correct plat of the situation there? A. Yes, sir.

Q. You made the plat yourself? A. Yes, sir.

Judge Kennerly: We offer it in evidence.

Mr. Gordon: I want to examine the plat and the witness in reference to the correctness of it.

(Plat ordered sent up to Appellate Court by trial judge.)

Questioned by Mr. Gordon:

Q. Did you survey the league? A. No, sir, I did not go around the entire league.

Q. Did you survey the Neches River? A. No, sir.

Q. Did you meander Village Creek? A. No, sir.

Q. When at this point where the division line between the upper two-thirds and the lower one-third intersects Village Creek and also the point where the Santa Fe Railroad crosses the creek, and also the point where the north line of the league crosses the creek, you then did not meander Village Creek at those points? A. Of course I did not.

Q. How far did you meander from the north line of the 1850 acre tract? A. Which tract is that.

Q. That is what you call the south one-third? A. Of course it would be near this point, the north line of the league right here.

Q. You simply went to those points? A. Yes, sir.

Q. You did not meander the creek from either point?

A. No, sir, I did not.

Q. As a matter of fact Village Creek makes a bend practically like a horse-shoe along in here and around the sand pit, does it not? A. Well, in a general way I think that shows the course of the creek between those two points.

Q. That does not answer my question? A. Well, I could not say as to the horse-shoe, whether it does or not.

Q. You don't know how it runs because you did not go there? A. I have been around the creek there; around the course of the creek; I did not meander it.

Q. Is it not a fact that where that sand pit is there Village Creek is practically a horse-shoe surrounding that sand pit on the west, west and south? A. I could not say as to that.

Q. You say that is not true? A. No, sir; I don't know.

Q. Then the creek you have there, you don't know whether that is Village Creek or not? A. Yes, sir; I do.

Q. You don't know that that is a correct delineation of Village Creek on the ground, do you? A. No, sir; not at that very point.

Q. How can you swear that plat correctly delineates Village Creek? A. It does according to the measurements I took.

Q. Since you did not meander Village Creek you don't know the crooks, turns and courses it runs between those points? A. No, sir; I don't know every small crook and turn.

Q. They are over a half mile apart, are they not, those points from the north line intersection to the railroad inter-

section; that is pretty near a mile, is it not? A. Well, it is about 1500 varas from this point to this.

Q. You mean straight up north? A. No, sir; to this point here.

Q. The point where the division line crosses the creek and also from here? A. Yes, sir; 1500 varas, approximately.

Q. Don't you know the league is 2500 varas wide, and that to take that third off there would make it about 1600 varas? A. Yes, sir.

Q. That is on a line due north of the intersection of Village Creek to the north line of the survey? A. Yes, sir.

Q. But Village Creek runs in a northwesterly course, does it not? A. Yes, sir.

Q. From that point? A. Yes, sir.

Q. Is it not a fact that it is nearly a mile between those two points if you follow Village Creek, if you follow the strict meanders of the creek? A. If you follow the meanders of the creek, I guess it would be three times as far as a direct course across.

Q. You don't know whether it is or not, do you? A. That is just my estimate of it, merely an approximation of the distance.

Q. That plat you have does not undertake to show the course and meanders of Village Creek at all, does it? A. Not accurately according to the small meanders.

Q. Nor does it attempt to show the relative position of the excavation to this point on Village Creek, does it? A. I don't know what you mean by this point; which point do you have reference to?

Q. Well, the sand pit you have denominated there as

nearly half as long as the league? A. No, sir; I did not say that.

Q. It is approximately, is it not? A. I should say about one-third.

Q. If Village Creek is practically three times 1600 varas between these points, and one-third of that would be 1600 varas, you don't mean to tell the court and jury that the sand pits and those excavations are 1600 feet long? A. No, sir; I do not.

Q. That map shows that, does it not, practically one-third as long as Village Creek is between those points? A. The meanders of the creek were not taken closely, as I have told you.

Q. It is not scientifically correct, is it? A. No, sir; not with the meanders of the creek.

Q. As to size and distance is that scientifically correct? A. It is with reference to the width of the creek, I should think, and the points I have taken measurements to and put on the plat.

Q. With reference to the sand pit, I will ask you as a civil engineer if you call that a correct map? A. It is as far as I took the measurements for the purpose I made it for.

Q. Well, so far as you did not, it is not, is it; so far as you did not take the measurements, it is not correct as far as the information it gives is concerned? A. As far as the measurements I made are concerned, it is correct.

Q. What measurements did you make? A. I stated with reference to the sand pit and Village Creek. We measured here from the point where the division line crosses the creek north to get the distance from the division line, you understand.

Q. What was that distance? A. I have not got that on the map; I can refer to my field book and give it to you.

Q. I ask you now for the distance there?

Judge Kennerly: The examination results in an argument between counsel and the witness. The testimony has shown that the map is admissible, and we are entitled to go ahead with our examination of our own witness.

The Witness: It is about 518 varas from the division line to the most southern point on the Santa Fe.

Q. Is it due north of northwest, I mean the distance.

A. We run a line due north from this point out across here.

Q. That was 518 varas? A. Yes, sir.

Q. What else did you measure that located the pit? A. We measured the entire width between here and the north line of the league.

Q. Where does that go to? A. 1537 varas.

Q. That is straight across? A. Yes, sir; that is north and south.

Q. How did you know that you got to the north line?

A. It was pointed out as the north line.

Q. Who pointed it out? A. Mr. McClellan and Mr. McMahan.

Q. Who is W. A. McClellan? A. He is in the employment of the Houston Oil Co.

Q. Is he surveyor? A. I think he is; I know he does surveying work.

Q. You did not take that up to see if that was the line of the survey? A. We run to the northwest corner of the league as pointed out by him.

Q. You did not check that up to see if it was the

league line, but took his word for? A. We took that point as the northwest corner of the league.

Q. What else did you measure? A. Back to the creek, to the northwest corner.

Q. How far?

Judge Kennerly: We submit that he has shown that the map is admissible, and we are entitled to go ahead and examine our witness.

The Court: Do you want to make further examination in reference to the objection?

Mr. Gordon: Yes, sir.

The Court: If the map is admissible in evidence, even though you might want to assail the force of the testimony, it would be proper to do that on cross examination of the witness.

Mr. Gordon: It is only to show that the map is not correct and should not be admitted in evidence as a map.

The Court: I will permit the examination.

Q. What else did you do preparatory to making this map? A. I don't believe I stated the distance from the northwest corner; we measured that distance to the creek.

Q. Chained it? A. Yes, sir.

Q. Who were the chain carriers? A. Mr. McClellan and my father.

The Court: I think that is taking it too far. Ask him what he did. That cannot bear on the admissibility of the map.

Q. What did you do preparatory to drawing this map?

A. I took some measurements to the sand pit.

Q. Where did you commence? A. I began at the southern end of the sand pit here to make my survey.

Q. How far from the house? A. What house?

Q. The house on the hill? A. I don't know what hill you have reference to and what house.

Q. You didn't see a house there right on top of the hill right opposite the station, this house right here (showing picture No. 1 to witness)? A. Yes, sir; I recognize that house as being the house on the plat here.

Q. Where did you commence with reference to that for your measurements? A. Well, it is 18 varas from that house.

Q. Which direction? A. It is a little bit southeast from that house.

Q. You started there? A. Yes, sir.

Q. Where did you go, giving the measurements? A. Well, that would be quite a difficult proposition to give all the measurements just now, but if you want me to go into detail I will tell you.

Q. What did you do on the ground, you are presenting a map here?

The Court: I will admit the map in evidence and you can state your objections to it.

Mr. Gordon: The objection is that the map is shown to be incorrect.

Objection overruled.

Plaintiffs and interveners except.

DIRECT EXAMINATION CONTINUED.

Questioned by Judge Kennerly:

Q. Now, what is this denominated in red on this map?

A. That shows the area of the sand pits, the excavations.

Q. These are sand pits? A. Yes, sir.

Q. Where sand has been taken out? A. Yes, sir.

Q. Excavations? A. Yes, sir.

Q. The two red patches on the plat which lie most northerly, one on the east side of the Santa Fe Railroad track and the other on the west side of the Santa Fe Railroad track marked "Sand-pit," what do those represent? A. Excavations on the side of the track.

Q. What are the conditions on the ground in reference to those two excavations, what did you find there? A. The railroad runs through this hill there, and of course in the right of way the sand excavated is in a cut and out as far as I have represented on the map the excavations have been made and the sand taken out.

Q. Those excavations, are they correctly delineated on this map, drawn to scale so that the excavations are correct in reference to the balance of the league? A. Yes, sir.

Q. About what is the area of the most northerly of the two excavations, one of them being on the east side and the other on the west side; did you measure the one on the east side? A. Yes, sir.

Q. What is the area of that? A. 36/100 of an acre.

Q. That is the excavation on the east side of the railroad track, the most northerly one on this plat? A. Yes, sir.

Q. How far is that from the depot at Fletcher? A. I could only approximate that distance; I did not measure the distance.

Q. About how far is it? A. You mean to the upper part of it.

Q. Now, sir, about the center of the excavation on

the east side of the track? A. That is about five or six hundred varas.

Q. A lawyer always has to pass through his mind what a vara is. I will ask you whether or not you calculated the quantity of sand or earth taken out of the excavation on the east side of the track? A. Yes, sir; I did.

Q. What did you find the quantity to be taken out of there? A. 3955 cubic yards.

Q. 3955 cubic yards? A. Yes, sir.

Q. I will ask you whether or not that excavation appears to be an artificial one or a natural one? A. It is artificial.

Q. How high are the banks of that excavation? A. They vary in height.

Q. Did you measure the banks on the east side? A. Yes, sir; I measured it at various places in the pit. It varies from two or three feet to ten feet.

Q. You made those measurements yourself? A. Yes, sir; I was running the instrument.

Q. When you say there is 3955 cubic yards removed from that excavation, you mean that much has been taken out without considering what was taken from the right of way? A. Yes, sir.

Q. Now, come to the excavation on the west side of the Santa Fe Railroad, and the most northerly one on this plat. I will ask you if you measured the area of the surface of that excavation? A. Yes, sir.

Q. What did you make that? A. $49/100$ of an acre.

Q. About a half acre? A. Yes, sir.

Q. Was that a correct measurement of it? A. Yes, sir.

Q. I will ask you the same question in reference to that

as the one on the east side, is it a natural or an artificial excavation? A. It is an artificial one.

Q. Did you calculate the amount of sand taken out of there? A. Yes, sir.

Q. What is it? A. 6088 cubic yards.

Q. What is the character of the soil still there? A. Well, it is sand on the hill.

Q. Did you measure the banks of this one on the west side? A. Yes, sir.

Q. Give some of the dimensions, the highest and the lowest? A. Well, it runs all the way from 4 feet up to 11 $\frac{3}{10}$ feet.

Q. Are those banks from the piling up of the sand taken out of there, or is that an actual excavation; are the tops of the banks on a level with the surrounding territory, or is the soil piled up like building a tank? A. It is the natural surface around the edge.

Q. There is no sand piled up? A. No, sir; I don't believe on the west side of the railroad there is any sand piled up at all.

Q. How about the east side, any piled up there? A. Very little. You might say hardly any at all.

Q. These banks are caused by the taking out of the sand? A. Yes, sir; my measurements were made with reference to the natural surface of the ground.

Q. Where there was any sand piled up, you did not consider that in making the measurements? A. No, sir.

Q. Were those recent excavations or not? A. I don't know when they were made.

Q. You could not tell? A. No, sir.

Q. These are the most northerly ones up here? A. Yes, sir.

Q. Go back to the excavation which is near the Fletcher station and near the Santa Fe water tank shown on the plat here that is about the center of the northern part, I will ask you whether you measured those excavations? A. Yes, sir.

Q. Where did you commence the measurement? A. At a point near the right-of-way, the most southern point of the pit.

Q. The most southern point of the excavation near where it strikes the right-of-way.

Q. Then what did you do? A. Well, I measured the position along by the right-of-way.

Q. You ran up the right-of-way? A. Yes, sir; and determined the area and volume.

Q. That right-of-way extends fifty feet from the center of the track? A. Yes, sir.

Q. You ran up that right-of-way on the west side, the west line of the right-of-way as far as the excavation went? A. Yes, sir.

Q. Did you take measurements on out to determine the width? A. Yes, sir.

Q. At right angles with the Santa Fe railroad? A. Yes, sir.

Q. About how wide did you find this in here; give the distance that you ran in there? A. It was from the right-of-way line.

Q. Give the distance in there? A. In running at right angles with the track of course it would vary.

Q. Give the jury an idea how wide it is? A. I can not give it at the widest place.

Q. Give the widest and then the closest? A. It is about 330 feet at the widest place.

Q. At the widest place? A. Yes, sir.

Q. You took this little extreme north point, the little tit there nearest the railroad; how wide is that? A. That looks like about the nearest place there.

Q. Well, the point up here where it goes to the surface of the ground is about 41 feet? A. Yes, sir, and that ranges back to about 60 feet.

Q. Back to about 60 feet? A. Yes, sir.

Q. Give some of the other distances that show on the plat; you say the widest is 330 feet? A. Yes, sir.

Q. Give some of the other distances as to the widest points here to give the jury an idea? A. It ranges from 330 to 300, and then it gradually maintains that width pretty well for 150 or 200 feet, and at the main part of the pit it would be 300 feet wide.

Q. We are talking now about the pit or excavation nearest the Santa Fe track? A. Yes, sir.

Q. How long is your base line there? A. I will have to make a little calculation; that is 1080 feet?

Q. 1080 feet? A. Yes, sir.

Q. Then from the beginning point near the bank out as far as this pit goes is about 1080 feet? A. Yes, sir.

Q. Then it widens out as shown by the plat here? A. Yes, sir; in an irregular shape.

Q. Did you calculate the area of the surface of this excavation which is nearest the Santa Fe track? A. Yes, sir.

Q. And on the east side? A. Yes, sir.

Q. That is what? A. $4\frac{3}{4}$ acres.

Q. Is that a correct calculation? A. Yes, sir; it is.

Q. It was made from measurements on the ground?

A. Yes, sir.

Q. I want to ask you about the distance of this sand pit nearest the ground there, I mean nearest the track; how about the height of the banks of that excavation? A. Well, they vary in height of course. The southern part of it up here runs out to nothing, and in here it is 16 inches up to 11.6/10 feet. You will understand that around the other edges of the excavation it gets higher.

Q. What was the highest point? A. I have various measurements. I have one 11.6/10, and I have one 10.6/10 and 10.1/10 and 9 feet and 8.7/10, and 10.9/10 and 12.7/10, that is the highest place.

Q. Now, then, go to the excavation furthest from the Santa Fe tracks and northwest of the water tank; I will ask you if you made a survey of that? A. Yes, sir.

Q. How many acres did you find on the survey of that?

A. 2.38 acres.

Q. Now coming back to the survey nearest the Santa Fe track for a moment, I will ask you if you figured the quantity of sand taken out of there? A. Yes, sir.

Q. Nearest the Santa Fe track? A. Yes, sir.

Q. What is the quantity? A. 47388 cubic yards.

Q. 47388 cubic yards? A. Yes, sir.

Q. How much did you find taken out from the one furthest from the Santa Fe track? A. 29212 cubic yards.

Q. These amounts are correct? A. Yes, sir.

Q. Cubic yards? A. Yes, sir, that is correct according to the method I used.

Q. Was that a correct method? A. I think it was, yes, sir.

Q. Now, how high are the banks of this excavation furthest from the Santa Fe track on the west side, give the highest and the lowest? A. Well, it runs out to nothing there, the natural surface of the ground. North-west it figures in depth up to about 17.8/10 feet.

Q. That is from the top of the bank to the bottom? A. Yes, sir, from the outside surface of the ground to the bottom of the pit.

Q. I notice that in between the excavation nearest the Santa Fe track, and the one furthest from the Santa Fe track you have left a little white spot; what does that mean?

A. That shows the natural surface of the ground.

Q. There was no sand taken out there? A. No, sir.

Q. How far is it from the farthest point of the excavation furthest from the Santa Fe Railroad track to the railroad, did you take that measurement? A. Yes, sir; I can give it to you. 965 feet.

Q. 965 feet from the furthest excavation? A. Yes, sir.

Q. How wide at the widest point parallel with the Santa Fe track is this excavation furthest from the Santa Fe track, give the width of that? A. That averages about 240 feet.

Q. About 240 feet in width? A. Yes, sir, the widest place is about 260 feet.

Q. The average would be about 240? A. Yes, sir.

Q. What is it running at right angles with the Santa Fe track? A. About 570 feet.

Q. About 570 feet? A. Yes, sir.

Q. What is this you have delineated on here that looks like a railroad? A. That shows the switches that go out into the sand pit from the railroad.

Q. What is the length of that spur there from where it strikes the right-of-way of the Santa Fe to this end? A. I could not say exactly, but it would be more than a thousand feet.

Q. More than a thousand feet? A. Yes, sir.

Q. Is there a switch or sand track there now? A. Yes, sir.

Q. That was there the other day when you were there? A. Yes, sir.

Q. I will ask you whether or not at the place where you mark that white surface that sand track is broken in two; is that what you mean by the way you indicate it? A. I could not say on the ground; it seems that the track next to the right-of-way runs out to the outer edge of it, and then the narrow gauge track starts in.

Q. Is there a track in here? A. Yes, sir.

Q. Does that appear to be an old track or a new one? A. I could not say hardly about that.

Q. You know the distance from the northwest corner of the Felder league to the railroad track? A. Yes, sir.

Q. You also know the distance from the north-west corner of the Felder league to Village Creek? A. Yes, sir.

Q. What is the distance from the northwest corner of the league to Village Creek? A. 1790 varas.

Q. 1790 varas? A. Yes, sir. That is the distance from Village Creek to where the Santa Fe Railroad crosses the Felder league. No—I am wrong about that. That distance is 981 varas.

Q. 981 varas.

Q. You say you ran this north line of the Felder; did

you find a line there where you delineated a line? A. Yes, sir.

Q. Did you find the north-west corner? A. I did not identify the north-west corner.

Q. Where did you stop when you got there? A. At a point pointed out as the of the Felder.

Q. There was a line running from the Santa Fe Railroad in the direction you followed? A. Yes, sir, a plain line all the way.

Q. As long as you put it on the plat? A. Yes, sir.

Q. This line you have marked as the division line you found that line? A. Yes, sir, there is a line there.

Q. You took the distance from that division line to the south pit? A. Yes, sir.

Q. This sand pit is on the north 260 acres of the Felder league? A. Yes, sir.

Q. How long were you on the ground out there? A. We were there two days I think it was measuring the sand pits.

Q. I will ask you to examine this photograph No. 2 right here and then I will ask you what this is right here, if you recognize that? A. Yes, sir, I do.

Q. What are these here? A. They are stumps.

Q. They are pine stumps that show that trees had been around the sand pit? A. Yes, sir.

Q. That shows where the dirt was cut down? A. Yes, sir.

Q. Does it indicate where the surface of the ground was? A. Yes, sir, you can see it along here.

Q. Did you take any measurements to see how much

there was of where the ground is now, how deep the sand had been excavated? A. Yes, sir.

Q. Do you know which one you took it on? A. Yes, sir, this one on the right.

Q. The right hand stump on picture No. 2? A. Yes, sir.

Q. What did you find the depth excavated around there to be? A. 11.6/10 feet.

Q. Did you take any other measurements of trees to get the depth? A. I think that is the only one I had in my notes.

Q. Do you see that tree where Mr. McClellan is standing? A. Yes, sir.

Q. That is there, is it? A. Yes, sir.

Q. About what was the depth of that? A. I think about the same as the other one; they were not very far apart.

Q. In picture No. 2 you can see the water tank of the Santa Fe Railroad? A. Yes, sir, just to the right of what is apparently an old house.

Q. That house is there? A. Yes, sir.

Q. What kind of looking house is that as to age? A. It is an old looking house.

Q. Very old? A. Yes, sir, part of it is a log cabin; it looks to be very old.

Q. Do you know how far that house is from the most western line of the right-of-way of the railroad? A. Yes, sir.

Q. How far is that? A. 18 varas from the house to the right-of-way.

Q. To the most westerly line of the railroad right-of-way? A. Yes, sir.

Q. The house is not on the right-of-way? A. No, sir.

Q. How high is that bank adjacent to that old house, about? A. It is about 8.1/2 feet high.

Q. Now, referring to picture No. 1, I will ask you if you recognize that old house that Mr. McClellan is standing near; is that the old house you testified about? A. Yes, sir, that is the one.

Q. I will ask you if you see another house in the picture? A. Yes, sir, I do.

Q. Was anyone living in that house when you were there? A. I don't know for sure whether that is the house, but I think it is.

Q. That is the house about the center of the sand-pit fronting the railroad? A. Yes, sir. There was some one living there.

Q. On your plat I notice you have three houses denominated, which is the old house you say is 18 varas from the right-of-way that you have testified about on the plat? A. On the plat it is the closest to the railroad, to the right-of-way.

Q. That is the one closest to the edge of the pit? A. Yes, sir.

Q. I notice you have another house between that house and Village Creek? A. Yes, sir.

Q. How far is that from the first house you are talking about, about how far? A. About 85 varas, I think it is 85 varas.

Q. To the old house? A. Yes, sir.

Q. Is that the old house towards Village Creek? A. Yes, sir.

Q. How does it look as to age? A. I think it is about as old as the other house.

Q. It is about as old as the house you speak of 18 varas from the right-of-way? A. Yes, sir.

Q. It appears that you have another house shown on that plat; is that the one you spoke of in which some one is living? A. Yes, sir, that house is occupied.

Q. Do you know the darkey's name who lives there? A. No, sir, I did not, I don't know his name.

Q. You did not learn his name? A. No, sir.

Q. Those two old houses that are near the southern portion of the excavation, do you know anything about how old they are; was anybody occupying them, did you see anybody living there? A. I did not notice. I saw some furniture in there; I did not see anybody living there.

Q. Do you know on an average about the size of an ordinary flat car; how much sand an ordinary flat car will hold, how many cubic yards? A. About ten yards is about the average.

Q. It depends on the size of the car? A. Yes, sir.

Q. Now, how many cubic yards did you figure had come out of the four excavations you have testified about? A. 86600 yards.

Q. How many cars giving ten cubic yards to the car would that be? A. 8600 cars.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You did not meander any of those excavations, did you? A. I did not go around and meander the edges of them.

Q. You took base lines and just run lines out? A. I ran to determine the area of the sand pits.

Q. Take for instance, the pit along the railroad right-of-way, I mean a base line parallel with the railroad right-of-way; you then ran lines out to the edge of the pit, and then squared it up and made your calculations from estimate? A. No, sir, I made a survey of the line as described. I laid out rectangles on the surface, horizontal measurements to determine the area and these rectangles were 36 feet by 30 feet; I can show the jury how I did it.

Q. All right, go ahead? A. You see this is the base line measured out here 36 feet, and that runs perpendicular to this other 36 feet and back to this 30 feet. I took measurements for the depth of the pit, and then when I got to the edge of the pit, I had so many rectangles and united the plus which I got to the fraction of a foot.

Q. Now, is it not a fact that the outside lines of the excavation are constantly varying and changing? A. Yes, sir, it is an irregular surface.

Q. Now, is it not a fact that the correct method of finding out the area is to meander the excavations? A. The correct area can be gotten as well I think by the method I used. I should think you could run lines every thirty feet and vary the outside line and get as accurate measurement of the excavation as by meandering it, taking in every creek and turn of it. Of course it is hard to get at the real outline of a sand pit because it is so weak. Running lines every thirty feet you can tie to the edge of the sand pit both ways.

Q. If you were measuring a tract of land that had considerable of its boundary on a stream of water, you would not meander that, would you? A. Yes, sir, I would.

Q. What is the difference between that and meandering the excavations of these sand pits? A. They would not be much difference.

Q. Why would you meander one and not the other? A. I started to say that the measurement, you could get it by the method I have described as well as if you had run them out, if you got from a certain distance out to the base, and you have your ties to determine the course and distance of those meanders.

Q. In meandering you would actually measure the line up to the river or excavation? A. Yes, sir.

Q. Why didn't you do that? A. Well, I did, I measured it.

Q. You did not meander it did you? A. I did not go around the edge if that is what you mean.

Q. Do you call running out lines at right angles with your base line meandering? A. No, sir, I would not call it in the strict sense of the word meandering.

Q. Yet if you were to go to measure a survey of land fronting a river you would meander the river, would you not? A. Yes, sir, you would have to have the courses and distances; that is the course of the river and the distance across the tract of land.

Q. What is the difference between that and this, a tract of land and a sand pit? A. There is no particular difference; I can explain a little further, and say that you could run out the whole of a league of land by running rectangles. Take a whole league of land and run every thirty feet across to the river front, and you could arrive at the area as close by that method as by actually meandering the stream.

Q. Do you not state as a civil engineer that the right way to measure a piece of property is to go around it and measure it? A. No, sir, not necessarily.

Q. I mean when the Houston Oil Co. is not interested in the law suit? A. No, sir, I don't think so.

Q. Well, Mr. Danzinger went there in 1902, and commenced taking sand off this right-of-way. Did you measure the sand he commenced to take in 1902, the excavation he began in 1902, and what he has made up to the present time?

A. I measured the sand pits as I found them on the ground.

Q. You don't know when those excavations were made?

A. No, sir, I don't know when they were made.

Q. Nor who made them? A. No, sir.

Q. You just found from a certain survey that somebody has been taking large quantities of sand adjacent to the railroad right-of-way and on the railroad right-of-way?

A. I did not attempt to measure the sand taken from the right-of-way.

Q. You did find certain excavations and removals of sand on and adjacent to the right-of-way, did you not? A. Yes, sir, there are excavations there.

Q. You got fifty feet off the right-of-way and ran a base line along the right-of-way from one end of the excavation clear up to the middle or on the north end of it, and found that to be 1080 feet? A. Yes, sir, I measured that line.

Q. Coming back from that little tit to the north, how much did you measure of that tit, how far up did it run and what was the width of it, that is along the right-of-way? A. It is about 250 feet long.

Q. That tit is? A. Yes, sir.

Q. How wide is it? A. I suppose this is what you are talking about.

Q. That is what you called it? A. No, sir. Judge Kennerly used that expression.

Q. That is this place along the right-of-way? A. Yes, sir.

Q. How wide is that? A. 41 feet. That is, at the point where it comes to the natural surface of the ground and it gradually increases in width back to about 60 feet in width.

Q. Does this plat show correctly by scale that measurement? A. Yes, sir.

Q. Now, at the north end of that the sand plays out and comes out into a kind of gully to the surface of the ground? A. I don't think it does. It is sand on the surface of course.

Q. There is no sand pit or anything like that up here is there? A. No, sir, not up where it comes out to the surface of the ground.

Q. There is no sand there is there? A. Yes, sir, there is sand there.

Q. Is it like this other sand, commercial sand? A. I don't suppose it is in any great quantities, but it is all sandy; the surface of the ground is sandy soil. I think there is a covering of soil, a kind of dirt soil.

Q. It is ^{the} soil or dirt as contradistinguished from sand? perhaps so. Of course you understand there is a little soil covering the surface and underneath that is sand.

Q. You are sure of that? A. Yes, sir.

Q. How far does it extend? A. Which way.

Q. Going north? A. Well, as far as that is concerned, this is a sandy country clear to the league line.

Q. Did you see that? A. Yes, sir.

Q. That is a part of the sand pit, is it? A. Yes, sir, here is the sand pit, the excavation I speak of.

Q. Don't you know that is nothing but sandy soil, that it is dirt and not sand, and that the furthest extremity of the sand as distinguished from the dirt is the northern extremity of that little extremity? A. No, sir, I don't think so.

Q. You say that is not so? A. Yes, sir.

Q. How deep did you say that was; didn't you say it was about six inches at the north end? A. Well, it practically feather-edges at the surface.

Q. It comes to practically nothing and that is the end of the sand? A. Well, I don't think so.

Q. Did you not say that it ran out to about six inches of a feather's edge? A. Practically if it was not a sand deposit I speak of the excavation I found there; that is the condition I found there.

Q. That it run out to a feather's edge? A. Yes, sir.

Q. Was there any sand left in the bottom of that? A. At the time I was there it was mostly water.

Q. Is it not a fact that that is simply a sand territory through there, and that was excavated out there in the direction of the railroad? A. Well, I can say this: That sand I have represented here is outside of the railroad right-of-way.

Q. There is a line here? A. Yes, sir, on the ground.

Q. Who put that line there? A. I could not explain.

Q. That looks like one and the same excavation, don't it. A. Well, it goes across here.

Q. The excavation goes right to the bottom does where the rails rest, does it not? A. Yes, sir.

Q. And what you have shown here is the part that is attached from the outside? A. Yes, sir, outside of the right-of-way.

Q. Now, then, when you got down into the old excavation that is on the west of that track. On your plat here you have indicated that there is some dirt still there that has never been removed, is that correct? A. Yes, sir, between the two pits.

Q. You don't call that a pit where the railroad went through and scooped up the soil? A. No, sir, I do not.

Q. It did not include that; you said between the two pits? A. Yes, sir.

Q. Now, then, give us the dimensions of that place that shows there on the plat. A. I show it on the plat as $2\frac{3}{4}$ acres. No, sir, I believe it is $2.38/100$ acres.

Q. I speak about this pit here on No. 2, what is the area of that? A. I could not say what the area of that would be. I don't understand what you mean by it. I would call this an excavation here.

Q. Do you call this an excavation; there are saplings there as big as your leg in the middle of it? A. I don't think so, not in this excavation.

Q. That is west of that one I have just inquired about? A. Yes, sir.

Q. Don't these appear to be saplings? A. Yes, sir.

Q. Some of them as big as your leg in the middle of it? A. I don't think so; there are some little saplings there where the sand has been taken out; I don't recollect the dimensions of them. I did not measure the diameters.

Q. There is no evidence of any sand pit there, is there, except evidence that years and years ago there has been some sand scooped up there where you have indicated, that extension being by red colored marks on the map? A. There has been sand taken out of there.

Q. When? A. I don't know. That is a sand pit there.

Q. Was that when they were building the railroad over there? A. I don't know; I said there was a sand pit there, and it shows like the other part of the pit, shows to be an excavation.

Q. You mean that many years ago before these trees commenced to grow somebody took some sand off that part of the land, that is they used the sand and made an excavation there; you don't call that a sand pit, do you? A. Yes, sir, I do.

Q. What is your definition of a sand pit? A. I would say it was a place where sand was taken out of an excavation.

Q. Between Beaumont and Silsbee how many sand pits are there where the railroad runs through banks of sand? A. I don't know.

Q. They are all sand pits, are they not? A. I don't know whether there are any sand pits or not.

Q. You do know as a matter of fact that the railroad between here and Silsbee runs through a great many banks of sand, don't you? A. I never made any observations of that and I could not tell you.

Q. You found one up there that you measured, the furthest north, the red marks you have here; that is a bank of ground that the railroad has cut through that you denom-

inate as a sand pit? A. No, sir, not at all; that portion that I have colored red is entirely outside of the limits of the railroad right of way; I did not attempt to measure the volume of sand that would be in the hill that the railroad right of way went through or measure the area of it.

Q. Don't you know as a matter of fact that the bottom of that excavation is only thirty feet from the railroad track on the right hand side from the railroad track itself, the bottom of the excavation on the main line straight out that it is only thirty feet from the railroad track itself? A. I can tell you what I know about it.

Q. You have reference to the one to the right? A. Yes, sir. The greatest distance from the railroad right of way line here is 50 feet from the center of the track at the point where the bank begins to slope, and from the bottom of the bank is 46 feet, and the total horizontal distance from the railroad right of way to the edge of the pit is 61 feet, 62 feet I believe.

Q. From the edge? A. Yes, sir.

Q. That is the total distance from the railroad track?

A. No, sir; I said from the right of way.

Q. The right of way is 100 feet wide? A. Yes, sir; 50 feet from the center of the track on either side.

Q. The greatest distance from that right of way line is how far? A. Sixty-two feet to the edge of the excavation.

Q. To the top or bottom? A. To the top of it of course.

Q. Did you measure that? A. I measured the distance to determine the area, of course.

Q. You always do that? A. Yes, sir.

Q. When was that hill cut through there? A. I don't know anything about that.

Q. You don't know when that cut was made? A. No, sir, I do not.

Q. Don't you know the railroad track is on a dump running from that point back towards Fletcher station? A. Well, the roadbed has been thrown up there.

Q. The railroad sand pit, I mean the roadbed at that point has been cut through that hill, has it not? A. I don't understand you.

Q. The railroad track makes a cut through that hill, does it not? A. Yes, sir.

Q. With the top and the bottom practically on a level as it is built through there? A. No, sir; the top of the hill, that is, the cut, is above the roadbed, the present level of the roadbed.

Q. Above the present level of the roadbed? A. Yes, sir.

Q. There is no evidence whatever of its having been worked for many years or ever having been worked other than by the railroad people through there? A. I could not say just when it was worked.

Q. I speak about the physical appearance of it on the ground? A. It shows to have been made some years back, that is, a few years, I could not say just the time or anything definite about the time.

Q. You are talking about the measurements to find out how much dirt, soil or sand, or whatever you are a mind to call it, whether taken off the side of the track outside of the right of way at that point, and you fix that as showing many cubic yards; you mean by that that you found it by the adja-

cent undisturbed hill, just how high that was, and then you took the measurements and calculated the quantity of soil excavated there? A. No, sir; I didn't do it that way. As I explained a while ago, I laid out these rectangles in the bottom of the pit, and at each corner of the rectangle I took measurements for the depth with reference to the best evidence I could get at from the surface of the ground at that point.

Q. In other words, you tried to figure out before the railroad was built through there how much there was there, and after the railroad was built through there and determine how much was taken outside of the right of way? A. No, sir; of course the natural surface of the ground is very plain on the east side of the railroad.

Q. Did you take the measurements including the excavations old and new next to the railroad track at the station of Fletcher, this clear portion on your map, this place right here? A. I measured the total excavations.

Q. You did that by striking an average as to what you could figure from the original top of the ground before it was removed? A. Yes, sir; I had points, for instance, those trees shown in the photographs would indicate the surface of the ground, and then on each side of the pit I had the natural surface to go by.

Q. And you found how much including the entire territory excavated next to the railroad track, in acres I mean? A. You mean in area?

Q. Yes, sir, in area? A. $4\frac{3}{4}$ acres.

Q. When that was excavated you don't know? A. No, sir; I could not say. I mean that much had been excavated as shown in the photographs.

Q. And that much had been originally scooped up there in the two farthest north extensions, is that right? A. The area?

Q. Yes, sir. A. Yes, sir.

Q. You have on this map one house at the southwest corner of this red splotch, and have that marked old house, and then you have another house a little southwest of that marked old house, and then between the two you have another one marked old house; did you find three old houses there? A. Yes, sir.

Q. Is there an old house in there southwest of the house in 50 feet of the railroad track? A. Yes, sir; there is a house there.

Q. Is that a little place there that is screened up, a kind of little screened porch? A. I don't recollect just how it is built.

Q. You don't recollect that it was an old house, do you? A. I think it was a pretty old house.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. He asked you about a house in 50 feet of the railroad; is there a house there in 50 feet of the railroad? A. No, sir, not of the track.

Q. The house you refer to is the old house 18 varas from the railroad right of way? A. Yes, sir.

Q. That house and the house which is situated southwesterly from that are old houses? A. Yes, sir.

Q. You stated to counsel on cross examination that you did not go around the edge of the excavations, but did measure to the edge. You mean that you took the base line

and measured to the edge of the excavation at different points? A. Yes, sir; at regular points.

Q. How did you get the quantity of sand taken from those excavations, explain that to the jury? A. I took the height and rod measurements at the corners of the rectangles 36 x 30 feet, and then measured out to the edge and took my heights at the slope at plus measurements, and then I calculated the volume from the measurements taken.

Q. In other words, you took the depth and width and length and then you figured the amount? A. The rectangles were all of the same area.

Q. You simply added them up? A. Yes, sir.

Q. Are you a graduate of the A. & M. College of Texas? A. Yes, sir.

Q. Of the engineering department? A. Yes, sir; civil engineering.

Q. What year did you graduate? A. 1911.

Q. How long did you spend there? A. Four years.

Q. Is the method you used in getting the area of excavations the same as taught and used there? A. Yes, sir.

Q. They are the scientific way of getting at it? A. Yes, sir; it is the scientific method of arriving at the volume of excavations.

Q. That is what they taught you at college? A. Yes, sir.

W. W. WILLSON, a witness for the defendants, testified as follows:

Questioned by Mr. Kennerly:

The Witness: Before I start in I want to state that I have read my testimony in this case before, and there are two instances about which I would like to make an explanation.

Q. Do you want to make an explanation? A. Yes, sir; if I can refer to that book (Printed Record of the former trial).

Mr. Gordon: We prefer that you go ahead and examine him and let him make such explanation as he desires on cross examination.

The Court: I see no reason why he should not make an explanation.

The Witness: I refer to p. 471; that is where my testimony starts.

The Court: Make your explanation as briefly as you can. If in the course of the examination or cross examination you want to amplify the explanation, you can do so. On p. 474 I said, "Well, I said it was a regular thing in the way of hauling sand, but it was in a way periodical. We would get a bunch of orders or have some especial requirement on the road to fill, and then we would go in there and get it out. It was regular in the sense that it was always open to demand, and possibly some months there would be an average of 25 or 30 cars taken out of there a week, and then skip two or three months." I want to say as far as commercial purposes are concerned, and to make it consistent with the statement I made there, the pit was always open, and it would leave it to argument or possible conclusion that the reference I made to the ordering of sand out of there might have been with reference to both commercial and railroad use, when I meant to apply it only to railroad use. In another place I gave the location of that pump house referred to as northwest from the sand pit, whereas it is northeast.

Q. That is the explanation you wished to give? A. Yes, sir.

Q. Your name is W. W. Willson? A. Yes, sir.

Q. Where do you live? A. In Beaumont.

Q. How long have you lived in Beaumont? A. Since 1895. I came first in 1895 and then came back in 1909.

Q. When you came here in 1895 I will ask you whether you had any connection with the GB&KC Railroad? A. Yes, sir.

Q. What connection did you have with it? A. I came here and took active charge of the road, but perhaps did not get a title until I had been here quite a little while when I received the appointment as Assistant General Manager.

Q. Who was the general manager? A. Mr. Kirby.

Q. Are you related to Mr. Kirby? A. Yes, sir.

Q. In what way? A. I am his nephew.

Q. What were your duties as assistant general manager of the GB&KC Railroad? A. Well, I had general charge of all the affairs of the company in the matter of its operation, but more particularly the local management of its financial affairs.

Q. Was Mr. Frank Aldridge connected with the road at the time you were? A. Yes, sir; he was, if not all the time, the major portion of the time.

Q. What was his title? A. General superintendent.

Q. Mr. Aldridge is dead? A. Yes, sir, he has since died.

Q. Where did the road run to from Beaumont at the time you came here in 1895, how far had it been extended? A. Just across Village Creek.

Q. Had they gotten to Silsbee at that time? A. No,

sir. I don't know whether it had gotten to Silsbee before I got on the ground or not. I will say it had not when I got to Beaumont.

Q. Do you know when the road crossed Village Creek, what year? A. That was in 1893 or 1894, I guess.

Q. That road is now the Santa Fee and runs out to Silsbee and Jasper? A. Yes, sir.

Q. Do you know the place just beyond Village Creek that is known as Fletcher and sometimes known as sand pit F? A. Yes, sir.

Q. How long have you known that place? A. Ever since I have known the railroad, practically.

Q. Did you know the railroad before you came here in 1895? A. Yes, sir.

Q. I will ask you whether you have been at the pit or the place where they took sand? A. Yes, sir.

Q. When were you first there with reference to the time you came to Beaumont. When were you first there after you came to Beaumont and had your connection with the railroad? A. The first time I went over the railroad and I probably went over it mighty quick after I got here to see how it looked.

Q. Do you know what was at that point at the time you first knew the sand pit or place where they took sand, when you first knew it? A. A sand pit.

Q. Now, describe what was there; were there any houses there? A. There was an old house there; it was there on the hill perhaps a little west of north from the pit, maybe 100 yards from the pit, it seems to me now.

Q. Was that house or not occupied when you went there? A. I don't know, sir.

Q. Was there anybody there; were they taking sand out at that time?

Mr. Gordon objects as leading.

Question withdrawn.

Q. State what conditions you found on the ground when you got there, what machinery was there and what side-tracks were there; explain to the jury what you found there in 1895?

A. The railroad runs around the foot of a little hill there, and leading off from the railroad into the hill was a switch, and in there were a few cars maybe loading at that time and maybe not loading at that time when I first went there; that is about all.

Q. This house on the hill was there? A. Yes, sir. I think that house was there, but I don't believe I saw it the first time; it was there soon afterwards.

Q. Did the GB&KC haul the cars out of that place? A. Yes, sir; we took all the sand taken out of that hill. Some of it was brought to Beaumont, and some used by the railroad company and some shipped to saw-mills and some may be to Port Arthur and different places. It was sand that was used for commercial purposes such as building houses and such things as that. It was adapted to that purpose and a good many people used it in building I know. We used it for ballast and had to use a lot of it to straighten up our track, and we used it for locomotive sand. We would dry it out and put it in the sand boxes of the locomotives to keep the drivers from slipping and the engineers used it for that purpose.

Q. Do you know whether the railroad used it to fill in any grounds in Beaumont? A. No, sir; I don't at any

particular place; the railroad used it along the line this side of Village Creek more or less.

Q. What was the character of the soil between here and Village Creek, that is, this side of Village Creek in about Pine Island Bayou, is it swampy or not? A. It is low, and the soil is a kind of clay gumbo and particularly from a mile or so this side of Pine Island Bayou down to within about four miles of Beaumont.

Q. This sand was used to ballast the track through that territory? A. Yes, sir.

Q. Who did the railroad get the sand from? A. The Texas Pine Land Ass'n.

Q. Did it pay for it? A. Yes, sir.

Q. How much? A. At the rate of about ten cents a yard for the sand, and as well as I remember the railroad figured on ten yards to the car.

Q. Ten cubic yards to the car? A. Yes, sir.

Q. And the railroad paid the Texas Pine Land Ass'n for it? A. Yes, sir.

Q. Do you know whether or not the Texas Pine Land Ass'n was claiming that tract of land where the sand was taken? A. Yes, sir.

Q. That was in 1895; how long did that arrangement for the taking of the sand continue, Mr. Willson, to your knowledge? A. As long as I stayed with the railroad, and I understand it still continues.

Q. You left the railroad what year? A. Either in 1901 or 1902.

Q. Can you fix the date more definitely than that?

A. Can anyone tell me when the oil gusher came in at Beaumont?

Mr. Gordon: January 10, 1901.

The Witness: I left there about February, 1901.

Q. Did you have anything to do with making the payments from the GB&KC Railroad to the Texas Pine Land Ass'n? A. Yes, sir; I had the superintendence of it.

Q. How often were the payments made, irregularly or monthly or otherwise? A. Generally by the month.

Q. Did those payments continue up to the time you left the railroad? A. Yes, sir.

Q. State whether or not they were continuous?

Mr. Gordon objects as leading.

(Question withdrawn.)

Q. Did you stop making payments or keep on making them?

Mr. Gordon: I submit that he ought to state the facts about it.

Objection overruled.

Plaintiffs and interveners except.

Q. Answer the question (question read to the witness)?

A. The sand business was a regular business and the payments were naturally continuous.

Q. Now, how was that sand loaded; I speak of the sand the railroad got: how was that sand loaded? A. By hands there, laborers with spades. At some time during my administration when we were ballasting track we had a steam shovel there.

Q. How was that shovel run? A. By steam and men.

Q. Who loaded those cars, the GB&KC or the Texas Pine Land Ass'n? A. Representatives of the Texas Pine Land Ass'n.

Q. Who paid the men who loaded them? A. The Pine Land Ass'n.

Q. Where did those men stay who loaded the cars? A. Usually the work was given to the natives around in the country there on the railroad this side of Silsbee.

Q. Now, can you give an idea as to the number of cars per day or week or month taken from there by your railroad?

A. Well, I should imagine 20 or 30 cars a month. We had a special arrangement about the use of the steam shovel for a time.

Q. That was run by a gasoline engine? A. No, sir; by a steam engine.

Q. Where was the steam engine placed? A. On the car with the shovel.

Q. Where was the car, on the right of way or out in the pit? A. The car was on the track out in the pit.

Q. You operated that and scooped the sand out and put it on the cars? A. Yes, sir.

Q. Coming to the matter of the commercial sand; you said that commercial sand was taken out; what do you mean by that? A. Sand sold to the public in the building line.

Q. Who operated that industry? A. The Texas Pine Land Ass'n; let's see about that; as well as I remember the orders were billed to the railroad company, and they were passed on to the Texas Pine Land Ass'n for loading the cars the same as if we loaded it, or rather, ordered it; of course we would have to furnish the cars to load on, but the railroad company was anxious to see the sand sold in order to get the tonnage.

Q. The railroad was anxious to get the Tonnage? A. Yes, sir.

Q. Would the railroad company pay the Pine Land Ass'n for it and sell to the public? A. Yes, sir; we would pay for it.

Q. About what number of cars a day or week or month would be taken out of there for commercial purposes during the time you were there? A. That is hard to say. At different periods we would have rather a large business, and at other periods it would slacken up. It was a continuous proposition, to a more or less extent, the use of that sand pit there.

Q. I will ask you whether there was any closing down or ceasing of the operation of that sand pit during that period for commercial purposes? A. No, sir; I don't think it was ever closed for commercial purposes at all; I don't think so.

Q. There was no time that there was not sand being taken out of there?

Mr. Gordon: I submit that he did not say that.

Q. Was there or not any cessation in the use of that sand pit for commercial purposes, taking sand out of there? A. There might have been sixty or ninety days at times that we did not sell sand out of there. I don't think it would run that long.

Q. Would there be that much time that they were not taking sand for railroad use? A. No, sir; either for railroad use or for commercial purposes it never was out of operation for a month at a time.

Q. For one or the other or both? A. Yes, sir, or both.

Q. Was there any house or houses built there during the period you have testified about? A. There was a house on the hill when I went there, and there was one other house built there. At this point near the sand pit we built a little pump house.

Q. What do you mean, a house for the pumper to live in? A. Yes, sir; he lived there; it was a house around the engine. They pumped water out of the creek for the locomotives there.

Q. Do you remember Mr. Carroll who lived there? A. Yes, sir. I knew a young Mr. Carroll; if I recollect right he was 35 or 40 years old.

Q. Where did he live? A. There at the pump house.

Q. Did he have any other house there during the time he was there? A. No, sir; not that I know of.

Q. How long was he there? A. I don't remember.

Q. Do you remember the time old man Carroll was there, the father of the man who was pumper? A. No, sir; I don't remember that.

Q. How long were the side tracks which ran into that hill that you speak of from the main line—how far out into the hill would the side tracks extend? A. I think that track was between three and four hundred feet long up until after we sold the railroad to the Santa Fe.

Q. Have you been up there lately, Mr. Wilson, have you seen that place lately? A. Six or eight months ago I passed there.

Q. I show you now picture No. 2 introduced in evidence here, and ask you to examine it and see if you recognize the country there? A. It don't look very natural to me.

Q. What is this? A. That is an old house there. I don't think that is the house I had reference to, do you reckon it is?

Q. That is for you to say. You recognize that as the vicinity? A. Yes, sir; I do.

Q. These switches or railroad tracks that ran into the

pit, were they permanent or temporary or shifted about as the sand was taken out? A. They were shifted about. In other words, they would be running out one direction one month and probably another direction the next month to get the sand. They would generally go in the same general direction, but they would move backwards and forwards through there.

Q. Do you know anything about whether there was any timber cut; do you know where the Charles A. Felder league is in Hardin County? A. No, sir; only from information.

Q. Do you know whether there was timber cut by any person about the time you have been testifying about there in the vicinity of this sand pit out east or northeast or north of that place? A. Timber cut for what?

Q. Tie purposes or saw purposes or for any purpose; do you have any knowledge of timber being cut there? A. Yes, sir; while I was running that railroad there were ties taken up off the right of way from Village Creek to as far as Silsbee perhaps. There used to be ties loaded within a half mile of the sand pit sometimes.

Q. Do you know where the tie camps were located? A. No, sir; I don't; out there in that country somewhere.

Q. Do you know whether pine timber was cut from that league? A. No, sir; I don't know about that.

Q. Do you know Mr. Fortelberry? A. Yes, sir; I knew him in his lifetime; he is dead.

Q. While you were with the GB&KC, I will ask you whether he had any connection with the Texas Pine Land Ass'n? A. Yes, sir.

Mr. Gordon: Before he answers the questions I would like to ask if he knows of his own knowledge what connection

Mr. Fortelberry had or what some one told him; do you know of your own knowledge his relationship to the GB&KC Railroad,—I mean to the Texas Pine Land Ass'n?

The Witness: I know that Mr. Fortelberry had to do with the men that loaded the sand, and a lot to do with other men engaged in cutting wood, and I just understood from the course of the business there that he was an employe.

Mr. Gordon: I submit that he cannot prove the agency of Fortelberry by that kind of evidence.

The Court: The declaration of an agent would not establish agency, but the conduct of the agent might be a circumstance from which agency would be inferred.

Q. When you represented the GB&KC, I will ask you with whom you dealt as representing the Texas Pine Land Ass'n in the conduct of the getting of the sand out there. You paid the Texas Pine Land Ass'n a dollar a car. Who did you deal with in making the payments? A. With the Texas Pine Land Ass'n's Silsbee office by correspondence.

Q. In the matter of loading the cars who did you deal with? A. We would notify Mr. Fortelberry or notify a man named Oglesby at different periods, or we would notify the Silsbee office, and they would notify some one there.

Q. Why would you notify Mr. Fortelberry?

Mr. Gordon: That would not be competent evidence?

Objection overruled.

Mr. Gordon: We object to his stating his conclusion or reason for notifying him.

Q. Why would you notify Fortelberry? A. We understood that he represented the owner of the—

Mr. Gordon: That is not competent to prove Mr. Fortelberry's relationship to them.

Objection overruled.

Plaintiffs and interveners except.

Q. What did Fortelberry have to do with loading the sand if anything? A. The sand would be loaded after we asked him to do it.

Q. You paid the Texas Pine Land Ass'n for that same sand? A. Yes, sir, we paid them for the sand.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You say you were the assistant general manager of that railroad in the active management of its affairs? A. Yes, sir.

Q. Were you not just dodging the sheriff and constable most of that time? A. No, sir; not all the time; I dodged some.

Q. Where was Mr. Kirby during that time? A. He hung out most of the time down in Boston. That is where we sold our bonds.

Q. How often did he come back to Texas? A. We would see him two or three times a year during the period of selling bonds. He would go to Boston and sometimes stay ninety days or maybe six months at a time before he would come back.

Q. He did not go up there and stand around the sand pit much did he? A. No, sir.

Q. He would generally see that sand pit as the train went by? A. Yes, sir.

Q. That sand pit was just west of the railroad track at Fletcher Station? A. Yes, sir; just west and maybe a little north.

Q. It run right along the railroad track; what direction does the railroad track run there? A. Pretty near due north, and then the sand pit is a little west of that track.

Q. Now, the track was built right through that sand bank was it not? A. No, sir, right in the edge of the little hill there and that hill is sand.

Q. It is built right on the edge of it? A. Yes, sir.

Q. The hill is on the line of the track as you go north?

A. Yes, sir.

Q. Now they built the track where they got the sand right on the right of way, didn't they? A. Well, when I got here that track laid a considerable distance from the right-of-way.

Q. Well, about sixty feet at its widest point, didn't it?

A. No, sir, the track was between three and four hundred feet long at that time.

Q. I mean that it run along not quite parallel with the main line, but just branches from the main line until it got away from it about 25 feet? A. I think it got off the right-of-way a distance of about 75 feet anyway.

Q. At its furthest point away from the main line? A. No, sir, at its closest point. I should say where the track left the main line to where it left the right-of-way it was possibly not exceeding 75 or 100 feet long where it ran outside the right-of-way.

Q. And then ran along and branched a little to the west off from the main line? A. Yes, or a little to the north.

Q. It is going north but branches a little to the west?

A. Yes, sir, that is right.

Q. Is it not a fact that until 1902 when Mr. Danziger went there the furthest extension of it was not over 80 feet

off away from the railroad company's right-of-way? A. Well, I could not say as to that. I was not here before 1895.

Q. I speak about the time you went there in 1895 up to 1902? A. State your question again, please.

Q. I say is it not a fact that the furthest point of that spur away from the right-of-way, which was 100 feet wide, that the furtherest point of that spur where it stopped in the sand was not exceeding 80 feet from the right-of-way measured straight away from the right-of-way to the end of that spur when Danziger went there in 1902? A. No, sir.

Q. It is not a fact? A. No, sir. It extends further than that. The track runs about 75 feet and leaves the right of-way and then runs off into the sand pit, the center of the pit that is there now. At the end of that three or four hundred feet of track, I believe it would be 150 feet from the outside line of the right-of-way.

Q. To the end of that track? A. Yes, sir.

Q. When did it get that way and when was the end of that spur run out there? A. About 1895, about the time we started to use the track.

Q. Was that when you put the steam shovel in there? A. No, sir; we put the steam shovel in there after we sold the railroad to the Santa Fe.

Q. Is it not true that in 1895 when you were running the road along the edge of the sand bank to scoop it up as you went along extending the track along down the right-of-way, but merely bearing off from the right-of-way to take sand in there near the main line? A. No, sir, you are mistaken about that. We were taking the sand out of the hill and after we got 75 or 100 feet we left the right of way and

went on out in the hill; we went away from the right-of-way and followed out into the hill.

Q. I am trying to get at where you put it? A. If you will give me a pencil I will show you.

Q. Give us your best opinion about it? A. I think it was 150 feet from the outside line of the right-of-way to the end of that spur. We had a spur in there which I was using that was between three and four hundred feet long.

Q. Was there not a big hill of sand there that you did not go into, but extended the track down the right-of-way? A. We never got into the base of the hill; we got to a part of it.

Q. Did you not on several occasions pick up that spur and move it away from there? A. No, sir; we never did; we never uncoupled the rails, but it may have been shoved to one side or the other. It was never disconnected from the railroad track.

Q. Is it not a fact that this main spur that you speak about a year or so before you sold to the Santa Fe had been disconnected and a car had fallen over into a pond of water made there by the excavation along the right-of-way, and the track and car and all had just fallen over into this pond? A. The men took the sand away until the track would not sustain the car, but that was long after the track had been made longer three or four hundred feet. The rails did not join together, and the track shoved to one side or the other. That was just a little steep track that would hold only two or three cars. When the cars got in there they would have to be pulled up an elevation.

Q. I want to ask you if it is not true that sometimes there would be two or three months at a time when there

would not be a car moved out of there? A. I presume I did answer that way, but if I did, I made a mistake; it would not be two or three months.

Q. Has your memory improved as you get older? A. It has improved as I go along and have a chance to inform myself.

Q. Have you been talking to Judge Kennerly? A. No, sir, each of you gentlemen invited me to look at that book, and as soon as I did I saw the discrepancy. I think nobody has talked to me about the case at all.

Q. When the Houston Oil Company lawyers put you on the stand on the other trial, they asked you this question: "I will get you to state on an average how many cars you would see set in there at a time for loading?", and didn't you answer: "Well, I said it was a regular thing in the way of hauling sand, but it was in a way periodical. We would get a bunch of orders or have some especial requirement on the road to fill, and then we would go in there and get it out. It was regular in the sense that it was always open to demand, and possibly some months there would be an average of 25 or 30 cars taken out of there in a week, and then skip two or three months." Did you swear that before? A. Evidently I did.

Q. Is that true or not? A. I don't think that is true. I tried to correct that when I got on the stand here.

Q. Was your attention called to that by Judge Kennerly? A. No, sir.

Q. Who called your attention to it? A. I borrowed the book and read it. The other part of it is all right with the exception of what I say at the last of it.

Q. Is that correct? A. No, sir, not about the period

of two or three months that cars would not be pulled out of there.

Q. Did you swear that before? A. I may have.

Q. You now say that is not right? A. I did not have time to think about it before. You gentlemen grabbed me off the street and I came in here and I had not touched the railroad for ten years, and I did not know what kind of pot you would get me into and I had to be careful.

Q. What facts have you got hold of since to refresh your memory? A. From recollections of running the railroad.

Q. When I got you on cross examination before I asked you some questions? A. Yes, sir, and you scared me.

Q. Did I scare you? A. Yes, sir.

Q. I read now from page 484 down towards the bottom: "I will ask you if there was not as much as six months at a time that a car of sand would not be moved out of there from 1895 to 1902?" and you answered "Yes, sir, possibly so and maybe twelve months." A. For railroad purposes I meant to say.

Q. That is not the question asked you, is it? A. No, sir, but it was not clear at the time; the importance of the question was not understood.

Q. Did I ask you that question? A. I don't remember it now, but I take it that is what transpired here.

Q. Did you make that answer? A. I think so.

Q. Was that answer true or not? A. No, sir, I stated that awhile ago, taking into consideration commercial use and railroad use all that business together there.

Q. Just preceding that question was this: "The Texas Pine Land Ass'n was not engaged in the sand business?" and

your answer was "No, sir, the Pine Land Ass'n was interested in selling the railroad as much sand as they could." A. Yes, sir, they wanted to sell the railroad too, they got 10 cents a yard.

Q. The Texas Pine Land Ass'n was not engaged in the business of selling sand except to you? A. Yes, sir, through us it was.

Q. Now, is that true that they were not engaged in the business of selling sand except through you? A. That they were not engaged in it at all except through us is not true.

Q. I thought you said that just now? A. They could have sold sand of their own accord. The railroad handled the sand.

Q. Did you answer this question this way: "The Texas Pine Land Ass'n was not engaged in the sand business?" "No, sir, the Pine Land Ass'n was interested in selling the railroad as much sand as they could." Did you swear that? A. I probably did.

Q. Did you say that or not? A. The Pine Land Ass'n was in the business of selling sand.

Q. Just answer my question? A. That is what I intended to convey. The railroad did not own the pit. The Pine Land Ass'n owned the sand.

Q. I asked you then right after that: "I will ask you if there was not as much as six months at a time that a car of sand would not be moved out of there from 1895 to 1902?" and you answered, "Yes, sir, possibly so, and may be 12 months." A. Is there not something in there about the use of that sand or for railroad purposes?

Q. I asked you if you did not swear that; did you

swear that? A. If you are reading from the book there, I swore it.

Q. Is that true, Mr. Wilson? A. No, sir.

Q. It was not so? A. No, sir.

Q. In what respect is it not true? A. Well, of course sand was taken out of there for commercial purposes and for the railroad.

Q. Did I not ask you then the next question: "How often did that occur?" and did you not answer, "That may have occurred once or twice during my administration there." Is that true or not true; did you swear that? A. Yes, sir, if that says so I did.

Q. Then is it true or not true? A. It is not true. It is not true that they stopped pulling sand out of there for any such period as that.

Q. When you said before that it may have occurred once or twice during your administration, that was not so? A. No, sir.

Q. Didn't I ask you in the same connection: "It was just as you would need a car of sand for ballasting, or as you would find somebody that wanted to build a house and would need some sand that you would get the sand?" and didn't you answer, "Yes, sir, as the demand arose." A. Yes, sir, the demand was always there.

Q. Did you swear that? A. The testimony reads that way.

Q. Did you swear what I read to you? A. Yes, sir, I did.

Q. Was that true? A. I thought so at the time.

Q. You say it is not so? A. Yes, sir, I have found now that it is not so.

Q. What is the truth about it? A. We used that pit continuously for sand.

Q. Now, I will ask you if in that same connection I did not ask you this question: "When you did not have the demand, it might be months at a time that you did not get sand?" and did you not answer "Yes, sir." Don't argue it, did you swear that? A. Yes, sir, I did.

Q. Was that true or not? A. I thought so at the time.

Q. You now say it is not so? A. Yes, sir, I have found out it is not.

Q. How did you find out; from what sources did you refresh your memory? A. The circumstances of operation there.

Q. Your memory is more fresh now than it was two years ago? A. Yes, sir.

Q. It gets better as you get older? A. Yes, sir.

Q. Did not Judge Hightower, who was conducting the case for the Houston Oil Company, take you on re-direct examination and ask you this question: "Did you mean to answer the question that the plant would lie there for months at a time without any operation, the sand pit; was that your statement to Mr. Gordon?—and did you not answer "I told Mr. Gordon that when there was a demand for sand we went in there and got it. I do not believe there was ever a longer period than six months when we did not get sand there, and I don't believe that happened more than once or twice during my administration, and I have said that I considered that sand a regular business for the railroad company's use." Did you swear that? A. Yes, sir.

Q. Is that true or not? A. Yes, sir, I thought it was true at the time.

Q. Is it still true? A. Yes, sir.

RE-DIRECT EXAMINATION.

Questioned by Mr. Kennerly:

Q. How often were you out over the line, about how often? A. Often.

Q. What do you mean by often, once a month or week or how often? A. I passed that sand pit on an average of every week.

Q. When you got on the stand you wanted to make an explanation of your former testimony; is there anything further you want to say in explanation? A. No, sir, I take it it is understood now.

Q. Just state to the jury what are the facts about the continuous operation of the pit? A. The facts about the continuous operation are as I stated to the Judge. In the course of this thing and not having had a chance to reflect on it, when I came hurriedly into the court room I was careful about the answers I made to Mr. Gordon. After I testified and have had an answer in the record to refresh my memory, I know I was mistaken in that statement. The operation of the sand pit was continuous.

Q. A continuous proposition? A. Yes, sir.

Questioned by Mr. Gordon:

Q. The Santa Fe bought in 1900? A. Yes, sir.

Q. You left here in 1901? A. Yes, sir.

Q. How do you know the Santa Fe bought in July, 1900? A. Mr. Kirby said so. I know I drew pay from the Santa Fe Railroad for 11 months.

J. E. WITHERS, a witness for the defendants, testified as follows:

Questioned by Mr. Lee:

Q. What is your name? A. J. E. Withers.

Q. How long have you resided in this part of the country? A. About 28 years.

Q. Did you have any connection with the Gulf, Beaumont & Kansas City Railroad? A. Yes, sir.

Q. What was that connection? A. I began as a brakeman and later ran a train.

Q. When did you begin to work for them? A. The 10th of January, 1894.

Q. At the time you began work where did the line extend? A. From Beaumont to Cook's Bluff, three miles south of Silsbee; it was Cook's Bluff at that time.

Q. Have you been working for the railroad since then? A. Yes, sir, all the time.

Q. You mean by that you have worked for the same railroad line? A. Yes, sir, GB&KC until the Santa Fe took hold of it about 1900, and for the Santa Fe since.

Q. During all the time you worked for the GB&KC and the Santa Fe Railroads, state what positions if more than one you have held for either or both of them? A. For the GB&KC I was a kind of handy man. I would go out and pick up rocks occasionally and do steam shovel work for them and braking part of the time and construction work.

Q. Did you ever hold any other position with the GB&KC? A. No, sir.

Q. What positions have you held with the Santa Fe? A. Running a train as conductor.

Q. Conductor on what train? A. On a train that runs out of Beaumont north.

Q. Freight or passenger? A. Mostly passenger. I have been on a passenger since 1895.

Q. You have been on a passenger since 1895? A. It was a mixed train at the time.

Q. During all the time you have been working for the two roads, I want to ask you whether or not you were acquainted with the tract of land near Village Creek known as the Charles A. Felder league of land? A. I don't know the name of the land. I don't know any survey.

Q. Were you familiar with the tract of land just the other side of Village Creek? A. Yes, sir.

Q. There south of the railroad bridge? A. Yes, sir.

Q. How long have you known that tract of land? A. I went over it the first time the 14th of January, 1894.

Q. What is the condition of the soil there? A. Sandy, piney woods.

Q. Is it suitable for farming? A. I should not think so; I am not an authority on farming.

Q. Do you know where the place called Fletcher is? A. Yes, sir.

Q. How far is that from Village Creek? A. Right on the bank of the creek.

Q. What is the condition of the land now within a few hundred yards of Fletcher? A. It is sandy.

Q. I will ask you whether or not during any part of the time you have known this land there have been any sand operations going on near there? A. Yes, sir, there has.

Q. State to the jury the nature of those operations? A. Well, the first sand I remember taking out of there which I

believe was about the first, we had a work train in there hauling sand out on the right-of-way for the railroad.

Q. What time was that? A. I am kinder mixed on it, but I think it was in 1895.

Q. You said you were hauling sand out? A. Yes, sir, the railroad company; I had charge of the work train.

Q. Where did you get the sand? A. The first of it was right above what is known as Fletcher on the curve and dropped back to the sand pit this side, that is where we put the train in.

Q. If this is a correct plat of the creek and the railroad, now show about where you first began getting the sand? A. The first place we began getting sand out of there was at the point of the curve.

Q. On the right hand side of the road? A. No, sir, on the left hand side.

Q. On the left hand side going up? A. Yes, sir. That was the first steam shovel work about the point of that curve.

Q. How long did you work there? A. Three weeks.

Q. Where did you go then? A. Back into the sand pit right off from the second back of the creek where the water tank was located.

Q. Were there any houses there at that time? A. None that I remember of.

Q. How long did you work there? A. Well, I don't know; I think 30 days was about the time the work train was there ballasting the railroad to Beaumont. I was on the sand train that was hauling from above the Bayou to Beaumont, filling up the crossings, etc.

Q. How long were you engaged in moving the sand at that special time? A. About thirty days.

Q. Did you ever move any sand from there afterwards?

A. Yes, sir, at intervals we would pick up cars and take them out on the road.

Q. I will ask you whether or not during the time you have known this sand pit and moved sand from there any one else besides yourself has moved any from there for road purposes or any other purpose? A. Yes, sir, there was commercial sand taken from there. Mr. D. C. Young was the first man that got commercial sand from there.

Q. How much did he get? A. I could not tell you to save my life. Numbers of cars came out of there, but where they went and whose they were, I do not know. I didn't handle them.

Q. Tell as near as you can with what regularity sand was removed from there from 1895 to 1911? A. That would be rather hard and I would not like to say. The pit has been open at all times as far as I know since then.

Q. Has there been a track off into the sand pit during all this time? A. Yes, sir.

Q. I will ask you whether or not, as far as you know there has been a continuous loading of cars from that sand pit from 1895 to 1911?

Mr. Gordon: We object to that as leading and suggestive. It calls for a conclusion and does not seek to elicit the actual facts.

The Court: If he asks about a continuous occupation of the land, that would be invading the province of the jury, but I believe the question does not ask about a continuous occupation.

Q. State whether or not you have been more or less familiar with this sand pit and the operation of the sand pit

during all this time; how often have you passed there? A. Well, I have passed there every day, I will say ten months in the year.

Q. I will ask you whether or not if there has ever been a time as long as a month that sand was not being loaded in that pit? A. I could not correctly answer that. My opinion-----

Mr. Gordon: Don't give your opinion.

The Witness: Well, I would not say.

Q. You can give your recollection; what is your best recollection? A. My recollection is that there has been sand taken out of there at intervals all the time, but whether there has been intervals of two, three or four months that they did not take any out, I don't think that long; possibly there has been a month; I would not undertake to say.

Q. Will you state positively that there has ever been a period of a month when sand was not taken out of there? A. No, sir; because I passed there every day; I did not pay any attention; I did not handle the sand altogether.

Q. You stated that the tracks were there all the time? A. Yes, sir.

Q. You would not state positively whether sand has been moved every month or not? A. No, sir, I would not have any way of knowing.

Q. During all this time has your connection with the company been such that your attention would be called to the sand moving all the time? A. No, sir; I handled very little sand out of there except when I had the work train; the freights always handled the sand.

Q. You were familiar with the moving of the sand before 1902? A. Yes, sir; fairly.

Q. You have been familiar with the moving of the sand since 1902? A. No, sir; no more than passing and seeing it loaded and pulled out. I don't think I pulled a car out of there.

Q. I will ask you whether or not according to your best recollection the sand was moved away as continuously before 1902 as it has been since? A. No, sir; the commercial part of it was not before that time as regular as it has been the last ten years. There has been quite a lot of commercial sand taken out in the last ten or twelve or fourteen years.

Q. Do you know whether or not the G. B. & K. C. hauled any commercial sand out of there? A. No, sir; I could not say.

Q. They may have or may not have? A. No, sir; I could not say.

Q. Do you know who claimed to own that tract of land they were getting sand from? A. No, sir.

Q. Do you know who claims to own it now? A. No, sir.

Q. Have you noticed any houses near there recently? A. Yes, sir; there is a house west of the track 100 feet.

Q. How long has it been there? A. Since 1901 or 1902.

Q. Do you know who built it? A. A fellow named Tom Carroll.

Q. What was he doing then? A. Pumping for the railroad.

Q. Was the house occupied when it was first built? A. Yes, sir.

Q. State whether or not it has been occupied ever since? A. Well, I do not know whether it has been occu-

pied straight along ever since; there has been someone in it at intervals.

Q. Did you remember any time it was vacant, and no one living in it? A. No, sir, I don't.

Q. You don't know either way? A. No, sir, I don't.

Q. Has the house been there since 1901? A. Yes, sir, about that time; it has been built something like 12 or 13 years.

Q. Do you know anything about any wood ever being gotten off the land near the sand pit and close to the railroad right of way, piled on the right of way? A. Yes, sir; there was some wood right above the sand pit. There was a little wood yard on that curve.

Q. How long was that occupied there? A. Not long; we used to burn wood, and we used to stop and load it there.

Q. Who put the wood at the track? A. Mr. Fortelberry had the wood contract; I don't know who he sublet it to.

Q. Which Fortelberry was that? A. W. W.

Q. Where is he? A. He is dead.

Q. Do you know anything about any timber having been cut from this land? A. No, sir.

Q. Do you know anything about some ties cut? A. There have been some recently.

Q. How long ago? A. Within a year.

Q. Was any timber cut on the tract of land from 1895 to 1902? A. None that I know of.

Q. Any ties made off of it during that time? A. I don't know.

Q. You can't tell? A. No, sir.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. The first sand you took was for construction purposes north of the sand pit? A. Yes, sir.

Q. You had a steam shovel in there, did you? A. Yes, sir.

Q. It took you about how long to get all that? A. About three weeks.

Q. About three weeks? A. Yes, sir.

Q. Since that time there never has been any sand taken from that point? A. No, sir. Not from the first place.

Q. What is that little red spot for there on the map? A. North of the sand pit?

Q. Yes, sir. A. That is on the point of the curve.

Q. That was in 1895 you took that out? A. No, sir; they took the first out in the fall of 1894; that was along in the fall of 1894; I am not sure about the dates; I am pretty sure they got that shovel in 1894.

Q. That was a hill of sand the railroad company cut through? A. Yes, sir.

Q. If they got outside of the right of way, it was all done in that three weeks time? A. Yes, sir, or whatever time it was; I would not be sure it was three weeks; I would not be positive as to the exact time. I did not pay much attention to that part of it.

Q. That was a sand bank there and they were digging in that? A. Yes, sir.

Q. That was the size of it? A. Yes, sir.

Q. Sand was pretty cheap up there at that time? A. I could not tell what they paid for it.

Q. Land was cheap? A. I don't know anything about the price of land there.

Q. How long was it after that that you commenced taking some sand down at the pit? A. The following year; I am pretty sure in 1895.

Q. That was the first they got out of the sand pit? A. Yes, sir. That was the first I knew when they put the shovel in there.

Q. How long did you work in there? A. We were there about thirty days.

Q. And then you quit? A. Yes, sir.

Q. How long was it after that before you went back there and got any sand? A. I never worked back there with the shovel any more; they were hauling sand out of there from then until today you might say.

Q. Did they not frequently stop a car on the main line and get some negroes with wheelbarrows and spades and load a car that way from the edge of the right of way? A. No, sir.

Q. They didn't do that? A. No, sir.

Q. They would run the car out on the side track? A. Yes, sir. On the spur track in the sand pit.

Q. Is it not a fact that up to 1902, when Mr. Danziger went there or the Texas Builders' Supply Co. that outside of the railroad right of way no encroachment exceeding three-fourths of an acre had been made there? A. I don't know how much right of way they had there.

Q. 100 feet, 50 feet on each side of the track? A. I should not think they got very far out of the right of way.

Q. Just encroached a little outside of the right of way? A. Yes, sir.

Q. As much as half or three-quarters of an acre outside of the right of way? A. I don't know; it has been too long ago and I never paid any attention to it.

Q. It was a matter of but very little consequence was it not? A. It could not have been very far out of the right of way.

Q. Now, Jim, during that period when you worked 30 days with the steam shovel you were getting that sand for the purpose of ballasting the road? A. Yes, sir.

Q. You were extending the road constantly about up to 1901 along up towards San Augustine or Center? A. Yes, sir.

Q. You had other sand pits and gravel pits up the road, didn't you? A. They never had any regular pits; they have loaded numbers of cars of dirt up the road; they never had any regular pits, what they termed sand pits.

Q. Regular sand pits? A. No, sir.

Q. They did not haul this sand up towards that end of the road in making the ballast? A. No, sir.

Q. They used that on the other end of the road? A. Yes, sir.

Q. Is it not a fact that after your thirty days steam shovel excavation there, that sometimes there would be as much as six months that not a car of sand would be pulled out of there until Danzinger went there? A. No, sir; I don't think so. I am not clear on that. We used the sand for the round house and for engine purposes; we would put cars in there and load them.

Q. That was the extent of the operation? A. Yes, sir.

Q. As you would need sand you would put a car in

there and load it with shovels; get some one to load it? A. Yes, sir; generally the section men.

Q. That is the use and the only use that sand pit was put to until Mr. Danzinger went there in 1902? A. I don't know, Mr. Young is the one that went there.

Q. When Danzinger went there there had been a little encroachment on the outside of the right-of-way, probably a half or three-quarters of an acre? A. Yes, sir; I think pretty well out of the right-of-way about that time.

Q. About 1902? A. Yes, sir.

Q. That portion of the sand that had been excavated was the upper portion along by the right-of-way as you come towards the north? A. No, sir, after they cut that second strip there, that is after I got through there, they threw the sand back and cut it out there; the bank was jammed up against the right-of-way. They cleaned up all the right-of-way sand in the two excavations; it must be near the right-of-way, I don't know exactly.

Q. 50 feet is the width of the right-of-way from the railroad track? A. Yes, sir; the two strips must have gotten all the right-of-way. It was in 1895 that I made the last excavation there.

Q. You would not tell this jury, would you, that there would be sand taken out of there regularly every week or every month or every three months during the time you were there from 1895 until Danzinger went there in 1902? A. I rather think in the three months period I would be within the limit. I didn't think for a time that long no sand was taken out for some purpose.

Q. One or two cars? A. Yes, sir.

Q. The after one or two cars were taken out there

would be another lapse of several weeks? A. It took at least a car of sand for the engines a month.

Q. That is all the use there was? A. Yes, sir; all I knew of.

Q. You were there every day? A. Yes, sir; except when I would be laying off.

Q. Now, up to the time that Mr. Carroll built that house there was anybody living there or any crews there?

A. No, sir; not that I remember of. I don't remember seeing a house there until he put the house up there.

Q. That is a little house about 100 feet from the track? A. Yes, sir.

Q. West of the track and northwest from the pump house? A. Yes, sir.

Q. How often did you see the general manager of that company, Mr. Kirby during those years? A. Well, that is hard to answer; at one time he was away quite a lot.

Q. Did you ever see him standing around the sand pit any? A. No, sir; I don't remember that I ever did.

Q. He was in Boston nearly all of that time was he not? A. He was away somewhere. I don't know whether he was in Houston or Boston; he did not spend much of his time up there.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. When you speak of the steam shovel being in there, you mean the time you were operating it? A. Yes, sir.

Q. Were you talking about any other operation of the steam shovel or any one else taking sand out of there? A. No, sir.

469

Q. This thirty-day business, what do you mean by that, do you mean to say that you only worked thirty days or that nobody else worked but you? A. The crew was in there about 30 days ballasting the line from Pine Island to Beaumont.

Q. You were there during that time? A. Yes, sir.

Q. You did not mean for the jury to understand that the operation stopped when you stopped? A. No, sir; I went back on my old run then. The section men jacked the track up and put the sand under it.

Q. Did they stop working on the road when you stopped? A. No, sir; they kept working on the road all the time.

Q. Did they stop using sand? A. No, sir; there was sand taken out for other purposes, loaded there.

Q. How long does it take an engine to use a car of sand? A. That depends on weather conditions.

Q. Ordinary conditions? A. We had five engines and a barrel of sand to the engine on a night run.

Q. How long would it take one engine to use a car load? A. I don't know; we used up a car a month I think to furnish the sand for the engines.

Q. Mr. Wall testified that he came down there for sand for the Texas Pine Land Ass'n., engine, a tram engine would not use as much sand as a railroad engine? A. That would depend on the condition of the track, and whether the engine was run at night; a slippery dewy track would have to have lots of sand to hold to the rail. In the day time the rails are dry and it does not take much sand.

Q. Mr. Gordon asked if there had been as much as three months that the plant had not been in operation for commercial purposes or railroad purposes. Do you want the jury to understand you to say that for as long as three months no sand had been taken out of there? A. I don't think that much time elapsed that sand was not taken out.

Q. How about two months? A. Well, I don't believe there was much as two months that no sand was taken.

Q. How about one month? A. Well, I don't know; that would be another hard proposition.

Q. What is your best recollection as to whether it was as much as a month? A. My idea is that there never was as much as a month that sand was not taken out, but I would not swear to it, because we used sand for different purposes.

Q. What I want is your recollection about it? A. I know we got sand out of there and the Texas Pine Land Ass'n., got sand out of there, and that people got sand there for different things. They got sand from there to build mills and furnaces and brick work.

Q. Did the Texas Pine Land Ass'n., get sand there all the time? A. Yes, sir; I guess so.

Q. Then the GB&KC got sand for their engines and to ballast the track and for what other purposes? A. That is about all, for the round house and track ballast.

Q. That continued from 1895 up to 1902? A. Yes, sir. And from 1902 up to now.

Q. Where does the Santa Fe get sand now? A. I am not sure, but I think there at the sand pit.

Q. There never has been a time that the Santa Fe has not used some sand? A. No, sir.

Q. They use sand all the time and are bound to have it? A. Yes, sir. I don't know whether they get sand there now or over at Village Creek; they have not had that pit at Village except since 1907; I don't know when they opened that place.

Q. How often did you pass by there? A. I expect I would be by there on an average about once a day. This is the longest time now that I have not been on the run; I have not been there since the 9th of September; that is the longest interval that I have not been through there.

Q. You have been running towards Galveston? A. Yes, sir.

Q. Before that time you ran a train out there practically every day? A. Yes, sir.

Q. For what length of time? A. 20 years the 10th of last January. I went to work there 20 years ago.

Q. For a while you took water at Fletcher didn't you? A. Yes, sir.

Q. And when you were using wood, you got wood there? A. Yes, sir. Got wood a quarter of a mile above there.

Q. How near was that to where you took out the sand? A. 300 yards, I guess.

Q. How long has that been a place to get on and off trains, a flag station? A. Well, I don't know just when that station was put in there, about 1905, I think; I don't know just when that station was named there; we would stop there for water, but it was some time before the station got a name.

Q. If a fellow wanted to get on, you would let him

on? A. Yes, sir. The end of the track was right above there.

Q. Mr. Lee showed you the plat introduced in evidence and used in connection with the testimony of Mr. W. A. Woods which I wish to identify now as Plat A. Mr. Gordon was asking you about this place up here where you first had your steam shovel. You would not say that anybody did not take sand from the right side there? A. No, sir.

Q. You would not say that nobody took sand from where you took it with the steam shovel? A. No, sir.

Q. There was no steam shovel working at this point? A. Yes, sir; on the left hand side.

Q. You did not say that nobody else did not work there sometime afterwards? A. No, sir.

Q. If I understood correctly, Mr. Gordon asked if in 1895 there had been about $\frac{3}{4}$ of an acre—

Mr. Gordon: I said up to 1902.

Q. What was your answer to that as to how much had been taken out in 1902? A. I could not say whether it run over the right-of-way very much; they took it out about 8 feet the last cut they went through there.

Q. Was that your testimony that only $\frac{3}{4}$ of an acre had been taken off of the right-of-way in 1902? A. I don't know where the right-of-way line was; nobody told me about boundary lines.

Q. What is your estimate of what was scooped out not on the right-of-way in 1902? A. I don't know what the area was then.

Q. Did you or not mean to convey the idea that only

$\frac{3}{4}$ of an acre had been taken out beyond the right-of-way in 1902? A. No, sir; I don't know what was taken out.

Mr. Gordon: From $\frac{1}{2}$ to $\frac{3}{4}$ of an acre I said.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Log trains were not hauled up there during the night time were they, but in the day time? A. They had a regular night run there.

Q. How many mills did the Texas Pine Land Ass'n., build up there for which they had to get sand to mix with the mortar? A. One mill is all.

Q. One car load of sand is about all that is necessary to build a furnace, is it not? A. Yes, sir; I think it would be.

W. T. HOOKER, a witness for the defendants, testified as follows:

Questioned by Mr. Lee:

Q. What is your name? A. W. T. Hooker.

Q. Where do you live? A. At Silsbee.

Q. How long have you lived there? A. Well, at the present time I have lived there about two years.

Q. Where did you live before you went to Silsbee? A. Roganville, Call, Kirbyville, Brownville and part of the time at Houston.

Q. What has been your vocation? A. I have been with the Texas Pine Land Ass'n and the Kirby Lumber Co.

Q. What were you doing for the Kirby Lumber Co.? A. Manager of mills and traveling auditor.

Q. What did you do for the Texas Pine Land Ass'n?

A. Had charge of the store and assistant bookkeeper and timekeeper.

Q. Where was the store? A. At Silsbee.

Q. When did you take charge of the store, when did you begin? A. The 1st of October, 1894.

Q. How long did you stay at Silsbee? A. About five years.

Q. Where did you go then? A. To Roganville.

Q. When did you leave Silsbee? A. Sometime in September, 1899.

Q. How long did you stay at Roganville? A. Until the spring of 1902.

Q. Then where did you go? A. To Houston.

Q. How long did you stay in Houston? A. Four years.

Q. What were your duties at Houston? A. I had charge of the stumpage of the Kirby Lumber Co. and traveling auditor most of the time.

Q. Where did you go when you left Houston? A. To Call.

Q. How long did you stay there? A. Five or six years.

Q. You left Houston about what date? A. I left Houston to take charge of the mill at Silsbee about the 1st of January, 1906.

Q. How long did you stay at Silsbee? A. Until the 1st of January, 1907.

Q. Then you went where? A. To Call.

Q. How long did you stay there? A. Between five and six years; something like that.

Q. Then you went where? A. To Brownville.

Q. How long did you stay there? A. About a year and nine months.

Q. Then you went where? A. To Silsbee.

Q. What is your present occupation? A. Merchant.

Q. You are a merchant? A. Yes, sir.

Q. How long have you been merchandising for yourself? A. About two years the 1st of next January.

Q. Do you know where the station of Fletcher is? A. Yes, sir.

Q. Where is it? A. At Village Creek sand pit.

Q. On what survey or league of land is it? A. I don't know.

Q. How long have you been acquainted with the station of Fletcher and the country around the sand pit? A. Ever since I went there twenty years ago.

Q. Since October, 1894? A. Yes, sir.

Q. How long after October, 1894, were you familiar with the sand pit? A. Up to the present time.

Q. What was the condition of the said pit or the country around Fletcher when you first became acquainted with it? A. Why, it is just cut-over timber land and the sand pit there, and I am not positive, but it seems to me there was a water tank there and a wood yard and a tie yard and things of that kind.

Q. Was there any kind of work around there then? A. Not that I remember except putting out wood there for the railroad or some tie business and something like that and the sand pit and a water tank. I don't know that all those things were there in 1894. There has been that kind of work going on there whether at that time or after that.

Q. Who put out wood there? A. My recollection is that Mr. Fortelberry did, W. W., he put out ties and wood on the GB&KC.

Q. If you know, state whether or not he was engaged with the Texas Pine Land Ass'n in any manner? A. I don't really know.

Q. You don't know? A. No, sir.

Q. Who was having the ties gotten out; who was getting the ties out? A. The GB&KC Railroad as I understood it.

Q. Who claimed the land there at that time? A. Mr. Kirby.

Q. Mr. Kirby? A. Yes, sir. That was always my impression, that he claimed it.

Q. What Mr. Kirby do you mean? A. John H. Kirby.

Q. Did he claim to own it himself? A. I declare I don't know. It was always known there as Mr. Kirby's sand pit and land around there.

Q. Do you know whether of not the Texas Pine Land Ass'n was claiming the land then? A. No, sir; I don't know; the timber was cut from the land around there when I went to Silsbee.

Q. I will ask you whether you know if any sand has ever been moved from the country around Fletcher? A. Yes, sir; there has.

Q. When was the first sand moved as far as you know? A. The Pine Land Ass'n used to get sand for their engines, and if I remember correctly they built the first mill in the latter part of 1895 or 1896, and then they got a good deal of sand from there for building purposes.

Q. What do you mean by a good deal? A. Several car loads.

Q. Did anyone else get any sand besides them? A. Not that I know of.

Q. How often were you near the sand pit? A. Every time I came to Beaumont, once a week or once a month or something like that, and while the Pine Land Ass'n operated there and while I was with them, I would go once in a while to see about the sand, getting it for the engines and building the mill.

Q. How often would you go on such occasions? A. I don't remember, once every month or two months, I had no regular time to go. I would go down when there was no one else to go; I was engaged in their business and they would send me when they needed me and there was no one else to go.

Q. How often was sand moved out of there? A. I don't know.

Q. To the best of your recollection how often was it moved? A. Well, the railroad company got a lot of sand out of there. I don't know how often they moved it out or anything of the kind. I was at Silsbee the first time between '94 and '99, and there was a good deal of sand taken out of there.

Q. Do you know what the area of the place there from which the sand was excavated was when you left in '99? A. No, sir; I don't.

Q. When you went there in 1894, were there any tracks or spurs off from the railroad into the sand pit? A. Yes, sir; it seems to me there was; I think there was.

Q. State whether or not there were any houses at the sand pit when you first went there? A. I don't remember.

Q. You don't remember? A. No, sir.

Q. In 1899 when you left were there any houses there? A. It seems there was a pump and some little house sealed up with a tent over it at that time.

Q. You mean it was sided or ceiled up and had a tent over it? A. Yes, sir.

Q. Where was the house or the tent located? A. Back of the hill from the sand pit, just out of the pit.

Q. How far from the water tank? A. I should think two or three hundred feet or 500 feet, I don't remember.

Q. How far from the railroad? A. Practically the same distance.

Q. About what kind of house or tent was that? A. My recollection is just a kind of house boarded up and a tent stretched over it.

Q. Had a tent roof? A. Yes, sir; a tent roof. That is my recollection about it.

Q. What direction does the railroad run there by the sand pit and by the house? A. North and south.

Q. North and south? A. Yes, sir.

Q. I will ask you whether or not the sand pit had been dug out to a point north of the house when you left there in '99? A. I could not say, I don't remember.

Q. Do you remember the depth of the excavation when you left there? A. Six or seven feet, I guess.

Q. How far had the excavation been extended from the railroad track west? A. I don't remember.

Q. You could not say? A. No, sir.

Q. You stated that you knew sand had been loaded there. I will ask you whether or not the loading of the sand from the time you went there in 1894 until the time you left in 1899, was continuous?

Mr. Gordon: I object to the question, first, because it is leading; second, it calls for the conclusion of the witness; and third, because the witness has stated he does not know.

Objection overruled.

Plaintiffs and interveners except.

Q. (Question read to the witness) A. What do you mean by continuous, every day?

Q. No, sir; I do not? A. I don't know about that; all I know is that we got it for the Texas Pine Land Ass'n probably once every thirty days.

Q. You don't know of your personal knowledge whether the loading was continuous or not? A. No, sir; I do not know as to that.

Q. I will ask you if you were ever there when the place appeared to have been vacated? A. No, sir; I don't remember that I was ever there when it appeared to be vacated.

Q. Were you ever there when there were no tracks or houses or cars or something there showing signs that the place was occupied? A. Not that I remember of.

Q. Since you left in 1899 how often have you seen the sand pit? A. I don't know; I have been in and out of Beaumont once a month or two or three times a month.

Q. So far as you know, since 1899 up to the present time has sand been loaded out of the sand pit? A. I know there has been some loaded out because I loaded it out myself since 1899.

Q. Who did you load it out for? A. The Kirby Lumber Co. They were building at Silsbee and I had several car loads loaded out there.

Q. During the time you have seen the sand pit since 1899, have you ever seen it when it was vacant and unoccupied and no signs that it was being used for any purpose? A. No, sir, I don't think I have.

Q. During the times you have seen it since then, I will

ask you whether or not it has borne evidence of cars being loaded out there on a track in the pit? A. I don't understand the question.

Q. (Question read to the witness) A. Yes, sir.

Q. It has? A. Yes, sir.

A. L. HARRIS, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Where do you live? A. At Beaumont.

Q. How long have you lived here? A. About 18 years.

Q. About 18 years? A. Yes, sir.

Q. What year did you come here? A. In 1897.

Q. In 1897? A. Yes, sir.

Q. What is your present employment? A. Manager of the Kirby Lumber Co. at Beaumont.

Q. You mean of the mill? A. Yes, sir, of the properties in Beaumont.

Q. How long have you been manager for the Kirby Lumber Co.? A. Since 1903, I think it was; 1903, or 1904—that is, not consecutively. I held other positions with them during that time; I have been with the company since I was 15 years old.

Q. Where were you raised? A. Texas.

Q. Did you have any connection with the G. B. & K. C. Railroad? A. Yes, sir.

Q. What year did your connection with that company commence? A. In 1897.

Q. Do you remember about what time in 1897? A. I think in April as well as I recollect.

Q. What was your first position with the company? A. Telegraph operator.

Q. Where? A. At Kirbyville and Ford's Bluff.

Q. How long were you there as telegraph operator?

A. Two or three months.

Q. Then what did you do? A. I was chief clerk to the General Superintendent.

Q. How long did you serve as chief clerk? A. Well, I was in that department until 1901, August, I believe.

Q. Did you have some title during that time? A. No, sir, I was employed as chief clerk, train master and assistant superintendent.

Q. You were train master and assistant superintendent at the same time? A. Yes, sir, I was train master with the duties of assistant superintendent.

Q. What are the train master's duties? A. The handling of all trains. The placing of cars and distribution of equipment.

Q. You continued that until August, 1901? A. Yes, sir.

Q. That was after the G. B. & K. C. sold to the Santa Fe? A. Yes, sir.

Q. Do you know where the place called Fletcher is situated? A. Yes, sir.

Q. Where is that? A. It is about 15 miles north of Beaumont on the Santa Fe Railroad.

Q. Where is it in reference to Village Creek? A. It is practically right at Village Creek.

Q. Just beyond? A. Yes, sir.

Q. How long have you known that land and territory in the vicinity of Fletcher? A. Since 1907.

Q. You mean 1897? A. Yes, sir, 1897.

Q. Do you know where there is an excavation where sand it taken at that point? A. Yes, sir.

Q. That is the point you are talking about? A. Yes, sir.

Q. What was the condition of affairs there when you first knew that property in 1897? A. We were removing sand from that point at that time. It was known as the sand pit and not as Fletcher.

Q. Who do you mean was removing the sand? A. The G. B. & K. C.

Q. When you first knew the place they were moving sand there? A. Yes, sir.

Q. How were they loading the sand at that time if you recollect? A. It was loaded by hand, section gangs, and there was a steam shovel worked in the pit for a portion of the time, just when I don't remember. I don't remember whether the shovel was working there when I first went with the road or whether it was afterwards, but generally throughout we loaded it with section hands.

Q. What was the G. B. & K. C. doing with the sand?

A. Using it for ballast and commercial purposes and for engine sand.

Q. What do you mean by commercial purposes? A. Selling it to the public.

Q. Whereabouts? A. Beaumont principally; I don't know of any other points, perhaps some to the Texas Tram and the Beaumont Lumber Co. at Buna. I think we furnished them sand for the tram engines at both Kirbyville and Buna.

Q. Well, what was done with it in Beaumont? A. It was used in building houses and filling in yards, lots, etc.

Q. Do you know of any particular property that was filled in in Beaumont? A. Well, it was generally used all over town at that time. It was about the only filling they had I think. I call to mind Mr. Cooper's lot on Calder Avenue; there were some circumstances connected with that that make me remember it.

Q. What about the railroad shops here? A. The Beaumont Wharf & Terminal Co. were building at that time in the City, and all their tracks were ballasted with the sand, and we used it in the shops for engine purposes, and we filled in our general office lot with it.

Q. That is the Calder Avenue station? A. Yes, sir.

Q. Where the trains stopped? A. Yes, sir.

Q. Do you recollect any other purpose? A. Yes, sir, it was sold from the cars to the general public. We kept it on the side-track, and as a rule if a contractor wanted sand he got it or bought a car of it and we loaded it for him and brought it in.

Q. Now, you spoke of the ballasting purposes that the railroad used it for; where was that used for ballasting purposes, at what point on the road? A. Well, in Beaumont on what is known as the Long Avenue track, and the track extending from the main line to Brake's Bayou; that track was ballasted with it beginning at the main line in the City limits practically to the river south. The track from Beaumont to Pine Island Bayou is built through what is known as gumbo and was hard to hold up and it was ballasted with sand. We were continuously using it on that particular portion of the track. This end of the line is through a gumbo country.

Q. You stated that they used it for engine purposes; where would they take it for engine purposes? A. Beaumont,

and we generally kept a car at Kirbyville for engine purposes.

Q. Do you know who the G. B. & K. C. were getting that sand from? A. No, sir, I do not; I always understood--

Mr. Gordon: We object to that.

Q. Don't answer if you don't know. I will withdraw the question. Do you know who you paid for it? A. No, sir, I did not have charge of the accounts.

Q. Do you know who was claiming to own the place where the sand was taken from? A. Only from general knowledge.

Judge Kennerly: We submit that is material.

The Court: Answer the question.

The Witness: Mr. Kirby.

Q. Do you mean Mr. Kirby individually or some one he represented? A. I always understood it was Mr. Kirby individually; that was what I understood.

Q. He was connected with a number of concerns? A. Yes, sir.

Q. A number of corporations? A. Yes, sir.

Q. I will ask you whether or not there was any time between 1897 when you went to work for the G. B. & K. C. and August, 1901, when you ceased work when the operations of that property as you have detailed stopped, and, if so, for how long? A. I could not answer that only from recollection.

Q. That is what I want? A. I don't think it was ever stopped; we would probably load 10 or 15 cars this week and put them on the sidetrack, and probably no more would be loaded for several weeks, and then again we would be continually loading there again for several weeks, just to meet the demands.

Q. When you say two or three or several weeks, what do you mean?

Mr. Gordon: I object to the question as not requiring expert testimony.

The Court: He asks what he means by it.

Q. Well, when those two or three weeks would elapse, would you take up the track and move it away? A. No, sir, we always maintained the track and equipment for loading at any time.

Q. Those tracks were sidings or spurs that ran out from the main line into the pit? A. Yes, sir.

Q. You rolled the cars out on those tracks and loaded them? A. Yes, sir.

Q. Was there a man named Carroll there during the time you knew this property? A. I can only say from memory; I think so.

Q. What was he doing there? A. He was a pumper.

Q. Where did he live? A. I think he had a little shack there at the pump house in that vicinity.

Q. Did you know a darkey there named Sim Collins? A. No, sir, I don't remember him.

Q. You do not say he was not there? A. No, sir, I do not.

Q. At the time you ceased your connection with the railroad in 1901, how long were the spur tracks that you say ran out into the pit? A. I would judge about 500 feet.

Q. 500 feet? A. Yes, sir.

Q. That is from the railroad, from the main line of the railroad? A. Yes, sir.

Q. In what direction did they run as compared to the main line of the railroad? A. Northwest I think.

Q. About what angle to the main line? A. Well, I suppose about fifty degrees.

Q. Then if the main line ran north and south, that would run west fifty degrees? A. Yes, sir, near fifty degrees.

Q. Did those tracks in the pit remain there like a railroad track not being moved at all, or did you shift them about? A. They would be shifted leading into the bank as we got into it.

Q. When you went there in 1897 had any sand been taken out at that time? A. Yes, sir, the pit had been used.

Q. Well, to what extent? A. Well, I could not say just to what extent; I had the placing of the cars in there—that is not personally; but through my orders; I would judge when we went in there first four or five car lengths.

Q. If the cars are thirty feet long, that would be about 150 feet, something like that? A. Yes, sir.

Q. When you went there in 1897, the track was probably 150 feet out into the sand pit?

Mr. Gordon objects to the question as leading.

(Question withdrawn).

Q. Just state how long the track was from the main line out into the pit when you went there in 1897? A. I can only state from recollection of the number of cars I would have placed in there, about 150 feet.

Q. About 150 feet? A. Yes, sir.

Q. That is what I thought you said? A. Yes, sir.

Q. You of course always had your cars to clear your main line? A. Yes, sir.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. What time in 1897 did you commence working for the company? A. I think it was in April.

Q. Where were you living then? A. I came to Beaumont to go to work for them.

Q. You lived here? A. No, sir, I lived in Orange at that time.

Q. You moved from Orange to Beaumont in April, 1897? A. I think so; I think April, I am not positive as to the month.

Q. Where did you live in Beaumont? A. When I came here I went to Kirbyville.

Q. In April, 1897? A. Yes, sir, about that time.

Q. How long did you stay at Kirbyville? A. Probably a month, and then I came back to Ford's Bluff.

Q. How long did you stay there? A. Probably three or four weeks.

Q. That would put you along in May or June? A. Yes, sir, about that time, if it was April that I began to work.

Q. You were telegraph operator there? A. Yes, sir.

Q. And dispatched trains? A. No, sir, not dispatching trains at that time.

Q. Telegraph operator for the railroad? A. Yes, sir.

Q. Where did you go from there, Mr. Harris? A. I came to Beaumont.

Q. Along about June, 1897? A. I think it was July.

Q. Where did you live here? A. I was boarding, I really forget the name of the family now.

Q. Where? A. I think it was on Liberty Street.

Q. Where did you work, where was your office? A. Out on Calder, the general office.

Q. At what is known as Calder Station? A. Yes, sir.

Q. What were you doing there? A. Assistant superintendent and chief clerk and also dispatching trains.

Q. You were over there every day practically? A. Yes, sir practically.

Q. Your duties required you to stay there? A. Yes, sir.

Q. You could not be out on the road and attend to the duties incumbent on you? A. I would have to go out on the road; I don't understand the question.

Q. Your duties were such as required your attendance and attention there and not out on the railroad? A. No, sir, I made trips over the road occasionally.

Q. How often? A. There would sometimes be probably several months that I would not go out, and again I might make several trips during the month depending on conditions, wrecks, train troubles, etc.

Q. You did not make excursions up there to look at the sand pit? A. No, sir.

Q. You paid no attention to that personally? A. Yes, sir, very close.

Q. How close? A. To see to the placing of cars there to be loaded and pulling them out; we had a great deal of trouble there.

Q. You ordered the cars down there from your office? A. Yes, sir.

Q. You did not see it done? A. No, sir.

Q. You were not cognizant personally of the operations at the sand pit except as you gave orders about cars moving to and from there? A. No, sir.

Q. How long did that condition continue with you? A. Well, practically the whole time I was with the road.

Q. How long did you remain on duty at the Calder Avenue station? A. Until the summer of 1901, I think about August.

Q. How long after the Santa Fe took it over? A. Four or five months? I don't remember just now what time they took it over.

Q. Now, until you moved to Beaumont you did not know anything about the operations of the sand pit, did you? A. No, sir.

Q. That was in July, 1897? A. Yes, sir.

Q. And you ceased your connection with the railroad in July or August, 1901? A. Yes, sir.

Q. Is it not a fact that the only sand that was moved out of that sand pit in the summer and fall of 1897 were some cars that were taken out by the railroad for the purpose of ballasting and furnishing sand to its engines? A. I could not answer that, I don't know.

Q. How many cars were taken out during that time? A. I could not say.

Q. How often were they taken out during that time? A. Sometimes once a week, and then several weeks might elapse and at intervals, I could not tell; there was no regular time for loading the sand nor pulling it out.

Q. You would simply send a flat car or flat cars up there and load the sand and move it out and the crew would go on about their business? A. We maintained a crew at

the section house, as I remember, this side of there, and I think they had a woods crew that was getting out wood, and those two crews as I remember loaded the sand whenever we sent orders out for it to be loaded. The section crew was about two miles this side of Fletcher in the Van Minter league may be, I don't know what league it was on.

Q. It was two miles this side of Fletcher? A. Yes, sir, the same section house is there now.

Q. That was a crew used to keep the railroad track in condition? A. Yes, sir, one of the crews.

Q. Where was the other crew you sometimes used? A. We used a crew that we had getting out fuel wood; they were up near Silsbee I think, I don't remember just where.

Q. Several miles north of this place? A. I don't know the location at all.

Q. At any rate they were not at Fletcher, were they, either crew? A. I could not say. I would give these orders to the train crews to be thrown off to the crews wherever they met them, and they would go in there and shovel up the sand and put it on wheel barrows and put it on the cars.

Q. And then you would move the cars out as needed? A. Yes, sir.

Q. Now, who was assistant general manager at that time? A. W. W. Willson.

Q. Is it not a fact that from 1897 to July, 1900, that sometimes there was as much as six months at a time that a car of sand would not be moved out of there? A. No, sir, I don't think so. I don't think there would be as much as fifteen days; it was a general proposition and going on all the time. It was open for business and they were there loading sand, keeping sand on hand or something all the time.

Q. Well, now, did you not get sand also from another place north of Fletcher near Silsbee? A. No, sir, no sand as I recollect; we got some dirt there.

Q. Do you have a recollection as to the difference between the sand that you got at Fletcher and the dirt you got on the Bradley league north of Fletcher? A. No, sir, the dirt I have in mind we got in Jasper County, a little dirt or clay; we found a little clay there at a point known as Quinn.

Q. Have you any recollection as to the operation of that clay place at Quinn and the sand pit at Fletcher, or is it all entirely mixed together as to the movements of the cars? A. No, sir; there is no mixture about it at all.

Q. How long would it take the crew to load a car of sand? A. Really, I could not tell you; there would be the section crew and we would send them an order to load a car or two of sand, and when they would get through, I don't know. The train crews would have instructions to take it up when loaded.

Q. They would load it in about an hour and a half, would they not? A. No, sir; I expect three or four hours maybe to load a car.

Q. Then it might be several weeks before they put another car in there? A. Yes, sir; it might have been.

Q. That condition is the exact condition that existed from the time you got acquainted with it in 1897 until about 1901, is it not? A. No, sir; we would sometimes have a car in there for several weeks every day.

Q. What year was that? A. I could not say.

Q. What month? A. I could not say, but we would have a bad spell of weather and we would find a mile or two of track in bad shape, and put on a work train for a week

or two and put in and load as many as fifteen cars and distribute them along at different places to be unloaded. We would load a number of cars and bring them to Beaumont, known as sand cars, cars not suitable for interchange, and keep them on the side track, and if a man wanted a car of sand, he would call our attention to it, and we would sell it to him.

Q. You would not get any more sand until you used that up? A. No, sir.

Q. Maybe several weeks would elapse before you would use all that sand up? A. Yes, sir; it could have been.

Q. Is it not a fact that it was? A. I could not say except from memory; I do not know whether it was or not.

Q. I understood you to say that there were times for several weeks that none would be loaded? A. No, sir; I said perhaps times for several weeks or a month that there were no cars loaded.

Q. At any rate, during that time the only people you had there were the crews loading and hauling the sand and the pumper that lived there? A. Yes, sir; we kept no regular crew there at that particular point.

Q. You said you sold some sand here to people for commercial purposes; who was it? A. I could not say; we kept it on hand, and if a contractor wanted a car of sand, he would go out and get it from the local agent here.

Q. You don't know who that was? A. No, sir; I suppose everything in Beaumont is built out of that sand pit.

Q. You do? A. Yes, sir; up to that time.

Q. You don't mean to say that, do you? A. I mean

foundation purposes, etc., practically all the sand that came to Beaumont came from that pit.

Q. Let's take a few buildings, for instance, and see if you will say that; you ought to know it? A. No, sir; I don't know it.

Q. Why did you say that? A. It was a general proposition that all the sand that came here came from us.

Q. Don't you know that the bulk of sand used from 1895 to 1901 when Danziger went there came from a sand pit at Liberty? A. I don't know it.

Q. You don't know it is a fact either that the bulk of the building sand used here came from Fletcher? A. No, sir.

Q. Why do you say that? A. Because I think so.

Q. What makes you think so? A. Having a sand pit and selling it out to people generally, I naturally assumed the sand came from there.

Q. You were running the trains and you know every car that came out of there during the time you were in office? A. No, sir; I don't know of every car.

Q. I wish you would tell the jury who it was that you supplied with the sand at that time when you had control of it? A. Our local agent handled the sand; I was handling the trains and not the sand. If he wanted sand he simply instructed me to have it on hand or have it loaded. There were various instructions in regard to the sand; it was disposed of through the agent; I had nothing to do with the disposition of it.

Q. Then you don't know what sand was delivered to building contractors in Beaumont? A. No, sir; I don't know which one.

Q. You don't know how many cars went into commercial use? A. No, sir.

Q. You don't know whether ten cars or 100? A. I know it was more than ten and I would judge a good many hundred, I don't know.

Q. Though you don't know? A. No, sir.

Q. You are just guessing at it? A. I am just giving my recollection of the amount of sand I handled and the only purpose it could have been used for.

Q. You cannot name anybody except Mr. Cooper that got any? A. No, sir; because I did not handle it personally. I think Mr. Cooper got behind with his building and wrote me a letter or someone a letter to hurry it out to him, and that is the way I remember it.

Q. Did they not fill Mr. Cooper's yard by the grading of the street by his house? A. They might have pulled dirt in there. The house was built on sand; he ordered it.

Q. One car? A. I don't remember how many cars.

Q. What year was that? A. I don't remember the year; I don't remember when his house was built.

Q. You don't know how many cars or to whom they were disposed of for any year or years during the time you were occupying that position? A. No, sir; not as to the number I could not say.

Q. Nor how often they were taken out of the sand pit?

A. No, sir; no more than I have stated.

Q. Now, I want to ask you about the tracks and switches; there never was but one track or switch in there during the time you were acquainted with the sand pit? A. I don't think there was.

Q. Judge Kennerly asked you about tracks and

switches, you meant only one? A. That switch was moved at times; there would be occasions for moving it.

Q. Is it not a fact that until Mr. Danziger went there in 1902 for the Texas Builders' Supply Co. that there had not been sand taken from an area exceeding a half or three-quarters of an acre outside the right of way? A. I could not say; I don't know; it depends on how high the bank was and how much sand.

Q. What is your best recollection about it? A. My recollection is that we were back in the pit ten or fifteen car lengths and probably fifty or sixty feet wide; that is recollection only; I am not positive about it. That is all we can do, give our best recollection.

Q. Now, I want you to say whether or not in your best judgment the area they excavated outside the right of way exceeded three-quarters of an acre until Danziger went there in 1902? A. Well, I don't know anything about that; I left there in 1901.

Q. Well, up to the time you left there? A. You say acre, you mean surface measure?

Q. Yes, sir. A. I don't know.

Q. Do you deny that that is a fact? A. No, sir; I do not.

Q. Do you claim it was exceeding three-quarters of an acre of the sand taken outside of the right of way by the encroachment of the spur that ran off there? A. I say I don't know.

Q. Now, is it not true that the railroad was built right along the edge of this big sand embankment, and after extending out some distance from it to the north it took a curve to the left and went around that point, and that the

sand that had been taken out up to the time you left in 1901 was simply that including the 50-foot right of way and the encroachment beyond the fifty-foot right of way by the extension of the spur that run along there simply bearing to the west of the main line of the track, and that this encroachment beyond the fifty-foot right of way did not exceed from a half to three-quarters of an acre? A. I could not say from an acreage standpoint. My memory is that there was four or five hundred feet of railroad track in there.

Q. Assuming that to be true, how much sand would that take out? A. I don't know.

Q. Is it not a fact that that track extended right along down the railway main line, bearing gradually out until it crossed outside of the railroad right of way and encroached onto the land outside of the right of way, so that, including all the sand that had been removed up to 1901 outside of the right of way did not exceed a half or three-quarters of an acre? A. I could not say, Judge.

Q. Do you deny that that is a correct statement of the way the spur was laid in there? A. No, sir, I don't deny it.

Q. This is your railroad track along here, and that spur went out like this? A. That is the way I recollect it.

Q. That is what you swear? A. No, sir; that is what I remember.

Q. Is your recollection clear on that? A. Fairly so, yes, sir.

Q. Now, I ask you if it is not a fact that that that extension was almost parallel with the main line of the track, and that that main spur was thrown in there when they used a steam shovel, and they did not use the steam shovel exceeding thirty days, and then took it up and left that track,

and it fell over into a kind of pond that was formed by the excavation, and that there was a freight car that had tumbled off in that pond at the end of that spur, and that therefore the only spur that remained in there up to the time that Danziger went there in 1902 was a stub spur holding about two or three cars, and that the furthest end of that stub track was 80 feet due west of the railroad right of way?

Judge Kennerly: We object to the question because it is wholly unintelligible and too long for any witness to answer.

The Witness: I can tell you how I remember that track was built. It led off from the track. I don't think it paralleled the main line at all. I think it went directly off from the main line.

Q. That is your testimony? A. Yes, sir; into the sand pit probably some ten or fifteen car lengths.

Q. How long did it stay in there? A. I don't know. It was shifted and moved from time to time.

Q. You are not certain about your testimony about that, about the spur track running practically at right angles from the railroad track? A. No, sir.

Q. You are not certain about that? A. No, sir.

Q. Don't you know that it is a fact that the steam shovel was only used in there about 30 days? A. It was a short while, I don't know how long.

Q. And then taken to Silsbee? A. I don't remember where it went; it was used for various purposes.

Q. It was taken to a place known as Red Cut? A. Probably it was after the Santa Fe took hold of the railroad; they put in several shovels.

Q. How many times did you pass that sand pit during

the time of your occupancy of the office on Calder Avenue?

A. I could not say; I was there at various times; it was a bad place to handle cars, and very often a car would get away and run off that end of the track, and we would go out there on Sunday sometimes and pick them up. That did not happen very often, maybe not more than every six months.

Q. When was that spur first laid out, that spur four or five hundred feet out from the railroad track? A. I could not say; we were building onto it all the time as we went back into the pit, as I remember, kept going further back into the pit and have to build more track.

Q. How long did it stay there? A. It was there when I left the road.

Q. You say it was moved about, where was it moved to? A. This bank was rather high and they would pull the track into it. I think the sand was practically exhausted on one side, and they went back into the other bank to load from that, and then the track would be thrown over nearer to the bank. It was in a very small radius around there.

Q. Don't you know that right now, today, after Danziger has taken thousands of yards of sand out of there, that it does not exceed three hundred feet from the main line of the railroad? A. I don't know anything about it since I left there.

Q. You are sure it was four or five hundred feet when you were there? A. Yes, sir; judging from the amount of cars I put in there.

Q. Are you not mistaken about the direction the spur track took from the main line? A. I might be.

Q. Is it not a fact that that spur track took a course al-

most parallel with the main line, but gradually bore off from it to the west, and running along the right of way for nearly its whole distance? A. I don't think so.

Q. You say that is not so? A. I don't think so, I don't know.

Q. You think that may be so? A. It might be.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennërly:

Q. But you do not think so? A. No, sir.

Q. You have given the jury the best recollection you have of the matter? A. Yes, sir.

Q. Did you hear Mr. Jim Withers' testimony? A. I heard the latter portion of it; I could not hear it very well.

Q. Did you hear him testify as to the use of the steam shovel in 1895? A. I heard him speak of it; I don't know when.

Q. The steam shovel he had in 1895, is that the steam shovel you are speaking about? A. Yes, sir, it must be.

Q. The time he was using it in ballasting in 1895, is that the time you are talking about? A. No, sir.

Q. The time you speak of was from 1897 to 1901? A. Yes, sir, after '97; I would not have any knowledge of it before that.

Q. How long are ordinary box cars? A. The cars we were using at that time were from 30, 32, 34 or 36 feet long. 36 feet was considered a long car and we had cars as short I believe as 28 feet.

Q. You told Mr. Gordon that it would hold 10 cars? A. Yes, sir; ten cars would be about 300 feet, and then added to that would be the steam shovel and the draw-heads

and couplings, and it would take four or five hundred feet to accommodate them.

Q. These cars of sand that were sold to the public personally you had nothing to do with the sale of them? A. No, sir.

Q. The reason you know of the Cooper lot is what? A. Mr. Cooper's contractor got behind with his work, and I think he made a personal request on some of us, and I think Mr. Cooper afterwards, and I made a special effort to get him in some sand.

Q. That was Mr. Cooper former Congressman? A. Yes, sir.

Q. This dirt in Jasper County, was that sand or clay? A. It was a mixture of dirt and clay, a heavier soil.

Q. Was that used for commercial purposes? A. No, sir, for construction purposes; that must have been in 98 or 99.

Q. Was it used extensively or otherwise? A. No, sir, only a small lot of it.

Q. You testified that those trains were operating under your orders; were your orders obeyed? A. Yes, sir, supposed to be.

Q. When you would order cars of sand loaded there, would they be loaded? A. Yes, sir, I would always see that they were loaded.

Q. You would see that your orders were carried out? A. Yes, sir.

Q. In operating a railroad there has to be some one who directs the movements of the train? A. Yes, sir.

Q. You were that man? A. Yes, sir.

Q. When you ordered cars loaded, you would see to it that they were loaded? A. Yes, sir.

MR. HOOPER, being recalled by the defendants, testified as follows:

Questioned by Mr. Lee:

Q. Did you ever see any houses near the sand pit?

A. Yes, sir.

Q. When did you see them there? A. I have seen them every time I passed there for eight or nine years.

Q. Did you ever go to either one of those houses or any of them? A. I was there at one time at one of those houses; that was in 1906.

Q. What time in 1906? A. The latter part of the summer or the first of the fall.

Q. Were you there by yourself? A. No, sir.

Q. Who was with you? A. Mr. McClellan and Mr. Bell.

Q. What Mr. McClellan? A. R. W. McClellan who lives at Silsbee, Ruch McClellan, I see him here.

Q. You mean W. A. McClellan? A. Yes, sir; that is his name. Mr. Bell is Master Mechanic at Silsbee for the Kirby Lumber Co.

Q. Anybody else? A. Yes, sir; an engineer and fireman, I don't remember the names; we went there to get some supper, some coffee and something to eat from an old negro there.

Q. What house was that? A. Just west of the railroad track, across from the Santa Fe.

Q. How far from the track? A. Two or three hundred feet, may be a little further, from the railroad track.

Q. Who was living there? A. I suppose that negro lived there; there was a family there; we got some coffee from the old negro.

Q. What was his name? A. Collins, Sim Collins.

Q. What was he doing there, do you know? A. He had a contract for loading sand.

Q. Who was he loading sand for, do you know? A. No, sir; I don't know; I know he was loading the cars that were down there for the people who paid for the sand; the Kirby Lumber Co., was buying it. The sand was loaded and there was no freight train coming by and they needed the sand and took a tram engine from Silsbee to get it.

Q. How long did the negro live there, do you know? A. No, sir; I don't.

Q. How old a house was it at that time? A. I don't remember; it was just a little box house.

Q. How many rooms did it have? A. It looked like two, a long room and a shed room.

Q. Did the negro have a family? A. There were some children around there and a woman.

Q. Did he have a wife? A. Yes, sir; a woman he called his wife.

Q. What was her name, do you know? A. No, sir; I don't remember; I heard it, but I don't remember now.

Q. What color was she? A. I don't remember.

Q. Is Collins living now? A. I don't know; I understood he was dead.

Q. Is his wife living? A. I don't know, sir.

Q. It was the latter part of the summer? A. Yes, sir; or the first part of the fall.

Q. In 1906? A. Yes, sir.

Q. Are you sure it was in 1906? A. Yes, sir. They were rebuilding the saw mill in Silsbee; the old mill burned in July, and it was the latter part of the summer or the

first of the fall. I was manager for the Kirby Lumber Co., at the time.

Q. What was your purpose in going there? A. To get two cars of sand.

Q. What were you doing with the sand? A. Concrete work.

Q. Around the mill, rebuilding the mill? A. Yes, sir.

Q. You got some coffee at the negro's house? A. Yes, sir.

HARDEN CLEVINGER, a witness for the defendants, testified as follows:

Questioned by Judge Konnerly:

Q. Your name is Harden Clevinger? A. Yes, sir.

Q. Where do you live? A. At Nacogdoches.

Q. Did you know or know of a man named Charles Clevinger or Charles A. Clevinger? A. I know of Chas. Clevinger, I don't know whether Chas. A., or not. I know of him through my father's family history.

Q. From your father's family history? A. Yes, sir.

Q. What relation was he to your father? A. From the best information I have, he was a great uncle of mine.

Q. That is, he was a brother of your grandfather? A. Yes, sir.

Q. When did your grandfather come to Texas? A. I think it was in 1826 or 1832.

Q. Do you know from family history whether or not one or more of your grandfather's brothers came to Texas with him? A. Two of the boys came to Texas; three started and two got to Texas.

Q. Three started and two got to Texas? A. Yes, sir.

Q. Where did the one that didn't come to Texas stop?

A. In Arkansas.

Q. Your father and another one of the boys came to Texas? A. Yes, sir.

Q. Where did your grandfather settle? A. At Nacogdoches.

Q. What became of the other boy? A. I don't know; they got separated in western Texas, and I don't know where he went to.

Q. Which one of the boys came with your grandfather?

A. Charles.

Q. How long have you lived in Nacogdoches? A. All my life; I was born and raised there.

Q. What is your business? A. I run a gin in Nacogdoches.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. What was your father's name? A. Joe.

Q. Joe what? A. Joe P. Clevinger.

Q. How did you spell Clevenger? A. Clevenger.

Q. What was your grandfather's name? A. Geo. W. Clevenger.

Q. How did he spell it? A. The same way.

Q. What was your great-grandfather's name? A. I don't know what his name was.

Q. What was your great-grandmother's name? A. Robinson, I believe.

Q. Give the names of your father's brothers? A. Bill, Dick, George, Jim and a half-brother named Tom.

Q. Is your father dead? A. No, sir.

Q. Your father is not dead? A. No, sir.

Q. All you know is what he told you? A. No, sir; I knew it through a distant relative of mine; we have had some correspondence; we got up a history of the Clevenger family, the family in the United States.

Q. You heard that through a distant relative who wrote you about it? A. Yes, sir.

Q. Where is the letter? A. I have it at home.

Mr. Gordon: I move to exclude his testimony because it is hearsay, and it develops that there is better evidence, first, because his father is living, and, second, the source of his information is from correspondence he had with somebody else which is not here and not accounted for.

The Court: The court admits the testimony because it is a species of hearsay testimony that becomes admissible because it is family history and the law does not concern itself with the method by which family history is obtained. The fact that he may have gotten the information from some letter does not make it secondary evidence.

Plaintiffs and interveners except.

Q. What was the name of this relative that you got the information from? A. W. M. Clevenger, of Atlantic City, N. J.

Q. When did you get this information? A. In 1911 or 1912, I forget which; I know it has been since 1910.

Q. How do you know that you are of the same family as this man? A. I am not sure we are of the same family, but from the information he gave me and other information --I have had several letters and have been corresponding since that time, and from the information he gave me I am pretty sure we are distant relatives.

Q. Who was Chas. A. Clevenger according to what he told you? A. A brother of my grandfather.

Q. I thought you said your great-grandfather? A. No, sir.

Q. What was your grandfather's given name? A. George.

Q. Your grandfather came to this country about 1832?

A. I think 1826 or 1832.

Q. What country did he come from? A. Virginia.

Q. Did you ever hear your father say anything about your grandfather having a brother? A. Yes, sir; something about it: he did not know where he was.

Q. Your grandfather's brother was never in this country as far as you know? A. No, sir.

Q. Never anywhere in this country? A. No, sir.

Q. You never heard of his being in this country anywhere, that is, Chas. A. Clevenger? A. They left Virginia together, the three boys did.

Q. He never was in Texas as far as you ever knew?

A. He came on to Texas with my grandfather, and after they got to Texas they got separated and I never heard of him again.

Q. Who told you that? A. My father, and then a great aunt told me about it.

Q. Where is she? A. She is dead now. My father knew but little of the family history; his mother and father died when he was an infant.

Q. Where did you and your family live? A. In East Texas, Nacogdoches.

Q. All the time? A. Yes, sir.

RE-DIRECT EXAMINATION.

Question by Judge Kennerly:

Q. You have been giving some attention to your family history? A. Yes, sir; I have.

Q. Your grandfather came to Texas in 1826 or '32? A. Yes, sir; somewhere along there.

Q. With him came his brother, Chas. Clevenger? A. Yes, sir.

Q. They got separated after they got to Texas? A. Yes, sir. They got separated I suppose after they got into Texas, three of them came to Arkansas together.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Where did they get separated in Texas? A. I don't know where it was.

Q. When did they get separated? A. I don't know.

Q. You don't know anything about it, do you? A. No, sir; only what I heard my aunt say, she said they got separated in Texas somewhere.

Q. They didn't get separated in Nacogdoches County? A. No, sir.

Q. You never heard of Chas. Clevenger being in that section of the country? A. No, sir.

Q. That is where your grandfather lived? A. Yes, sir.

Q. I want to be sure I have your name spelled right; spell it to the stenographer? A. C-l-e-v-e-n-g-e-r.

E. J. NEWBERRY, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Your name is E. J. Newberry? A. Yes, sir.

Q. Where are you from? A. Newton, Texas.

Q. How long have you lived in Newton County? A.

All my life except six months.

Q. Would you be embarrassed about telling how long that was? A. No, sir; 44 years.

Q. Have you ever held any public office in Newton County? A. Yes, sir.

Q. What office have you held? A. County Judge.

Q. How long? A. Four years. From 1906 to 1910.

Q. Did they beat you or did you quit voluntarily? A. I was defeated; they beat me.

Q. What is your business now? A. I am agent for the Houston Oil Co., working for them in the inspection department.

Q. I will ask you if you have been requested by anyone to make inquiry for a man by the alleged name or purported name of W. B. Barnett, who it is claimed signed the purported deed from Chas. Felder to John A. Veatch relied on by the plaintiffs and interveners in this case? A. Yes, sir; I have.

Q. I will ask you whether or not you were asked to make any investigation of any records to ascertain whether the name of that person appeared on such records? A. Yes, sir.

Q. Who requested you to make that investigation?
A. You did, Judge Kennerly.

Q. What records did you investigate? A. I investigated a portion of the records of Orange County.

Q. What portion? A. The index to deed records, volume one and two and the index to the probate records and the probate records, and the marriage records No. 1 or Vol. A.

Q. Those records commence about the beginning of Orange County? A. Yes, sir.

Q. And go down to about what date? A. Well, I could not say as to that; I did not take notice. They are old records, most likely I would find their names in the oldest records if they were there at all.

Q. Did you find them? A. I did not.

Q. Did you find any trace of a man named W. B. Barnett? A. No, sir; I did not.

Q. You examined the marriage records, the probate records and the deed records and what else? A. That is all.

Q. What other county did you examine on the same point, Judge? A. The records you mean?

Q. Yes, sir; what other records? A. None except the one I mentioned and Hardin County.

Q. You did examine Hardin County? A. Yes, sir.

Q. Just now you have been testifying about Orange? A. Yes, sir.

Q. What examination did you make in Hardin? A. I made the same examination there except that I did not examine the marriage records.

Q. Did you find any trace or record of the name of W. B. Barnett on those records? A. I did not.

Q. I will ask you whether or not you made the same

examination as to a purported man whose name appears to be Samuel Palmer? A. Yes, sir; I did.

Q. What did you find in Orange County in reference to Samuel Palmer? A. I did not find such a name in the records of Hardin nor in the records of Orange County.

Q. I will ask you whether you ever made any inquiry in reference to these two alleged persons or purported persons, W. B. Barnett and Samuel Palmer outside of your examination of the records of the two counties? A. Yes, sir.

Q. Who did you inquire of? A. Uncle Charley Hancock of Newton County and James Lee of Newton County.

Q. Why did you inquire of them? A. Because Uncle Charley Hancock is one of the oldest, if not the very oldest, men in the county, and a man whose recollection is most excellent for one of his advanced age, and a man also who has been in public life for a long time, and usually when I want to find out anything that transpired many years ago in east Texas, and especially Newton and Jasper Counties, I go to Uncle Charley, and if he does not know anything about them, I do not as a rule find anybody that does.

Q. Did you find any trace of anybody that knew of W. B. Barnett or Samuel Palmer? A. No, sir.

Q. What is the condition of Uncle Charley Hancock's health? A. It is bad.

Q. How old is he? A. 86 years old, will be in January; I get that from tradition; I could not testify to his age except from what he says. I have known him all my life.

Q. Was there any effort made to get him to come to court? A. Yes, sir.

Q. Do you know why it failed? A. Yes, sir; I do.

Q. Why? A. Because of his illness.

Q. I will ask you if you know the nature of the difficulty; is it not a fact that he has trouble in retaining his urine? A. Yes, sir.

Q. You could not get him to come on that account? A. Yes, sir; that is the trouble.

Q. You got no trace of W. B. Barnett or Samuel Palmer? A. No, sir; I did not.

Q. Uncle Charley Hancock is the grandfather of Mr. Hancock the lawyer here? A. Yes, sir; he is the grandfather of John Hancock, the lawyer who sits right over there.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. What is your business now in connection with the Houston Oil Co. I am their agent or one of them; I work in the inspection department, look after their lands, survey for them and estimate timber and such as that.

Q. And hunt up evidence in law suits? A. Yes, sir, I sometimes do that, Mr. Gordon.

Q. You live in Newton County? A. Yes, sir.

Q. In Newton County also is another ex-judge of the county, Judge Woods, who does the same thing for the same company? A. Yes, sir.

Q. That is the gentleman here? A. Yes, sir.

Q. That is his job also? A. Yes, sir; similar work.

Q. In the same county is Judge Woods' son who testified? A. Yes, sir.

Q. He is on the pay-roll like you are? A. Yes, sir.

Q. Doing the same work? A. Yes, sir.

Q. Three of you in Newton County? A. Yes, sir.

Q. Now, Mr. McClellan does the same kind of work for the Houston Oil Co. in Hardin County? A. Yes, sir.

Q. And Mr. Rawls in Jasper? A. Yes, sir.

Q. And Mr. Hopson in Tyler? A. Yes, sir.

Q. Every one of those fellows have been in attendance here from the beginning of the trial? A. No, sir.

Q. You have all been in the Court room during this case? A. I don't know whether Mr. Rawls was or not? He has been in town, I don't know that he has been in attendance.

Q. Do you know why all of you gentlemen are here in attendance in this case? A. I think I do.

Q. What is it? A. It is for the same purpose that other witnesses are here; very largely for the reason that you are here, Mr. Gordon.

Q. Until recently you did not know there was such a league as the Felder league? A. Yes, sir; I did. I heard of it in 1912.

Q. It is entirely out of your bailiwick? A. I don't know what you mean by that, but the league has been within my knowledge since 1912.

Q. You are down here as a witness in this case? A. Yes, sir. That is what I am here for.

Q. That is what both the Woods are here for? A. I could not say.

Q. And Mr. Rawls? A. I could not say as to Mr. Rawls; I don't remember seeing Mr. Rawls in the Court room; he has been here attending the Fair.

Q. And Mr. Hopson? A. Yes, sir.

Q. And Mr. McClellan? A. Yes, sir; I think they are here as witnesses.

Q. And Mr. McMahan from Newton Co.? A. Which one do you mean, there is a multitude of them?

Q. Polk? A. He is here, I don't know whether as a witness or not.

Q. Is Polk in the employment of the company? A. No, sir; but he is here.

Q. He came along to keep you company? A. No.

Q. When was Orange County created? A. I think in 1852.

Q. When was Hardin created? A. I think in 1854 or 1858.

Q. When was San Augustine created? A. I could not say.

Q. And Nacogdoches? A. I could not say.

Q. They are among the oldest counties in the State? A. I think so.

Q. And so is Jefferson County? A. I could not say.

Q. Why did you go to the two counties you went to to find people living there in 1839, long before those counties were organized? A. I went at the instance of Judge Kennerly.

Q. He told you to search in the new counties? A. No, sir.

Q. He did not tell you to search in the old counties? A. No, sir, I went where my duty demanded.

Q. Why didn't you go into San Augustine and see to that? A. I was not requested to do so.

Q. They didn't want you to do that? A. I don't know.

Q. Why didn't you go to Nacogdoches? A. I was not asked to.

Q. You know as a matter of fact from your services with the company that there are a great many original archives in both San Augustine and Nacogdoches County? A. I presume so, I don't know it.

Q. Judge Kennerly did not ask you to see if those men appeared in those papers? A. No, sir.

Q. So you went and asked Uncle Charley Hancock if he ever heard of Barnett and Palmer, these alleged people that Judge Kennerly speaks of, and Uncle Charley did not know about them? A. No, sir; and had never heard of them.

Q. You did not go and ask anybody else except Uncle Charley and Mr. Lee? A. No, sir.

Q. Is Mr. Lee a relative of the counsel here? A. I don't know whether he is or not. They are like the Woods and McMahan's, they are numerous in that County.

Mr. Lee: He is about a second or third cousin of mine.

Q. You know Mr. Rush McClellan here? A. Yes, sir.

Q. Did you ask him if he had heard about any of these people, the witnesses that signed the deed in 1839? A. No, sir.

Q. You did not ask him if he ever heard anything about them? A. No, sir.

Q. Why didn't you, he lived in Hardin County? A. No, sir.

Q. Why didn't you? A. I was not asked to.

Q. Judge Kennerly told you to go and ask Uncle Charley and Mr. Lee, did he, and you went and asked Mr. Lee and Uncle Charley? A. I believe those are the only two I asked.

Q. Did you ask them if they knew John Bevil? A. I did.

Q. Did they? A. Mr. Hancock did, Mr. Lee did not.

Q. Did you ask them if they knew John A. Veatch? A. Yes, sir; I asked him if he knew him and he said he did not.

Q. When did he say he came to that country? A. He said he crossed the Sabine River January 26, 1850, at Hutton's Ferry, Newton County.

Q. There are lots of people in East Texas, old men that were born and raised in this country, all over east Texas, lived here all their lives, in San Augustine Co., Jasper Co., Nacogdoches Co., Tyler Co., and Hardin Co.? A. I suppose some.

Q. You did not ask any of them, did you? A. No, sir.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. Did you make any inquiry for the witnesses on the other deed, the Daniels deed, Clevinger and the other man? A. Yes, sir.

Q. What did you find? A. Uncle Charley Hancock knew them.

Q. How long did he say he knew them?

Mr. Gordon: I don't think it would be permissible to detail what Uncle Charley Hancock said about anything; it would be secondary evidence, and hearsay.

Objection overruled.

Plaintiffs and interveners except.

Q. Did you seek to learn in the course of your in-

vestigations anything about the character for honesty and fair dealing of this man Clevinger who is a witness to the deed from Felder to Daniels?

Mr. Whitaker: We object to that. He never knew them and he certainly can not testify to what some one else told him about their honesty and integrity. We object because it is bound to be hearsay of the purest kind.

Mr. Gordon: There is no proof to show that the Clevinger named in this deed ever lived in that country at any time or any place. There is no proof that anybody ever knew this man or his reputation as a predicate for the question asked.

The Court: I sustain the objection to the testimony with the statement that the interrogatory appears to call for what this witness learned as to the general reputation for honesty and fair dealing of the subscribing witness to the deed from his conversation with Mr. Charles Hancock, and the Court upon that ground sustains the objection, holding at the same time that if the witness himself qualifies himself to speak as to the reputation for honesty and fair dealing of the subscribing witness, he can do so. The objection is sustained on the ground that he is apparently not attempting to give his own discovery of that reputation, but what some one else told him.

Judge Kennerly excepts and states that the witness would have testified that Mr. Charley Hancock stated that the reputation of these two men Clevinger and Lant was good.

The Court: I exclude it because it is hearsay.

Q. Now, of your own knowledge, do you know the reputation of those men? A. No, sir; I do not.

Q. Now, Mr. Gordon asked if you were not out of

your bailawick; where is your bailawick, don't you go anywhere that your employment calls you to go? A. Yes, sir.

Q. You were asked numerous and lengthy questions about Judge Woods and others being here. I will ask you if you see Mr. Ben Hooks in the Court room? A. I see a man called Ben Hooks here.

Q. Do you see Mr. Bracken? A. Yes, sir.

Q. You see several gentlemen sitting around the Court room probably interested with plaintiffs and interveners in the case? A. Yes, sir; men I understand are representing the plaintiffs in the suit.

Q. Now, Mr. Gordon asked you if I requested you to see Mr. Hancock and Mr. Lee; did I not request you to see and see if you could find anybody that knew these men Barnett and Palmer? A. Yes, sir; anybody that I might find.

Q. I did not tell you to go to either Mr. Lee or Mr. Hancock? A. No, sir.

Q. Counsel has called my attention to one matter that he did not get clear in his mind. Did Mr. Hancock say he knew Veatch or did not know Veatch; my associate did not understand what you said on that subject?

The Court: He testified that Mr. Hancock said he did not know Veatch.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Did you ask anybody about William A. Daniel?

A. No, sir; I don't think I did.

Q. You knew he was the man you were claiming under didn't you? A. I want to correct myself right there. I did ask Uncle Charley Hancock if he knew a man by that name.

Q. Did you ask anybody else? A. No, sir; I don't think I did; I don't remember it if I did.

Q. Did you examine the records to find out about Wm. A. Daniel? A. I don't think I did.

Q. Did you go to Nacogdoches County or San Augustine County? A. I told you I did not and the reason I did not go there.

MRS. L. MATTINGLY, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. You are the wife of Mr. A. Mattingly? A. Yes, sir.

Q. Who was killed about 1907 or 1908? A. Yes, sir.

Q. What is your present occupation? A. Telephone operator at Silsbee.

Q. Before moving to Silsbee did you ever live on the Montgomery League? A. Yes, sir.

Q. When did you move there? A. In October, 1901.

Q. Do you know where there is a sand pit or a place where they took sand on Village Creek? A. Yes, sir.

Q. Do you know what league that is on? A. No, sir; I do not.

Q. How far did you live from that place? A. About a mile and a half.

Q. Did you know during those days a negro named Sim Collins? A. Yes, sir.

Q. Did you know his wife? A. Yes, sir.

Q. What was her name? A. Narsis Collins.

Q. Where did they live? A. At the sand pit at Fletcher.

Q. Did they or not live there when you lived on the Montgomery league, I mean when you moved there? A. I don't know sir, but they were there in February or March, 1902.

Q. How did you come to learn they were living there? A. They first came to my house at the lake, a crowd of fishermen on the lake.

Q. The first you know of them? A. Yes, sir.

Q. Did they afterwards come to your house? A. Yes, sir, the fishermen got eggs from me all the time.

Q. Did either of them ever do any work for you at your home? A. Yes, sir; Sis washed for me and cooked for me.

Q. Now, do you know how long they lived there at the sand pit after you learned they were there in February or March, 1902? A. They lived there until May, 1907.

Q. State whether or not during that period they moved away? A. No, sir; not to my knowledge.

Q. If they had moved away you would have known it? A. Yes, sir; I was there at their place at least once a month.

Q. What were you doing there? A. Fishing.

Q. Fishing in Village Creek? A. Yes, sir.

Q. I will ask you what you found going on there if anything when you were there? A. Loading sand cars.

Q. What was Collins' business there? A. He was manager of the sand pit.

Q. When Collins and his wife moved away, did anyone else come in? A. Rube Mead.

Q. Did he have a wife? A. Yes, sir.

Q. What did he do there? A. He loaded cars.

Q. How long after Collins moved out before Mead came in? A. He came in before Collins left.

Q. Well, after Mead came in, did the operation of the sand pit continue? A. Yes, sir, as long as I stayed on the Montgomery league.

Q. When did you leave there? A. October, 1908, as well as I remember.

Q. Where did Collins and his wife live? A. They lived in a little house near the railroad track.

Q. Is that house there yet? A. I think it is, I would not be sure.

Q. Is it or not the house closest to the railroad? A. Yes, sir.

Q. Closest to the water tank? A. Yes, sir.

Q. Mead lived in the same house? A. Yes, sir; he lived in the same house awhile and later they built another house further from the railroad track and he moved into that.

Q. That is the house on the hill? A. Yes, sir; the two roomed house.

Q. With a long gallery in front? A. Yes, sir.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. When did Sim Collins leave there? A. I think about May, 1907.

Q. Where did he go? A. To Oklahoma.

Q. Who took his place? A. Mead.

Q. Is he the one they called Abe? A. No, sir; it is a different man.

Q. Is he a negro? A. Yes, sir.

Q. How long did Rube stay there? A. I don't know.

Q. Was it just a little while? A. I was there a couple of years after he came, and when I left he was still there and he was there after I moved.

Q. When was that? A. 1910.

Q. You had not seen the place for two years? A. Yes, sir; I was there in the spring.

Q. You were not there from 1908 to 1910? A. No, sir; just passing on the train.

Q. When you were living at Moosey Lake you got acquainted with Collins? A. Yes, sir.

Q. You were in there for the Houston Oil Co.? A. No, sir.

Q. You were put there by some lawyers? A. No, sir; I was not put there by anybody.

Q. Some lawyers from Alabama; did Capt. Montgomery of Alabama and J. H. Scott (?) make some arrangement with you for living there? A. Yes, sir.

Q. And pay you five dollars a month to stay there? A. Yes, sir.

Q. To hold the league against the Houston Oil Co.? A. Yes, sir.

Q. You stayed there until your husband was murdered? A. Yes, sir.

Q. Montgomery claimed to be one of the heirs of the original grantee, didn't he?

(Question withdrawn.)

Q. Did you know Mr. Tom Carroll? A. No, sir.

Q. You did not know Mr. Carroll? A. No, sir.

Q. Is it not a fact that Mr. Carroll built that house in March, 1901, and lived in it until 1903, the house that stood there near the railroad track at the sand pit? A. He was not living there in 1903, I am sure.

Q. (I will ask Mr. Carroll to stand up.) This man here did you see him living in that house? A. No, sir; I don't remember ever seeing him before.

Q. You were living at that time at Moosey Lake? A. No, sir; there on the Montgomery League at the Salher place. I moved to the league in 1901; I was never at the sand pit in 1901. Sim Collins' wife worked for me in 1902.

Q. What part of 1902? A. The latter part of 1902.

Q. The latter part of 1902? A. Yes, sir.

Q. You saw them at Moosey Lake? No, sir; I saw Uncle Sim at the lake, I never met her at the lake.

Q. Now, when did you first see the old woman? A. In July or August she first came to my house.

Q. 1902? A. Yes, sir; I believe it was August or September.

Q. That was the first time you ever met her? A. Yes, sir.

Q. When did you first go to Fletcher? A. I was there in 1903, the summer of 1903 was the first time I was ever at the sand pit; I was at the sand pit one time in 1902, but did not go where they lived.

Q. The first time you ever saw them living there was in the summer of 1903? A. Yes, sir. I saw them several times there in the middle and latter part of the summer. It was June or July that I first went there, and after that I was there several times.

Q. Try to identify how often? A. I could not say how often I was there really; I would go there hunting and fishing.

Q. She was living in the house near the railroad there?

A. Yes, sir.

Q. Did you see her there in 1904? A. Yes, sir; she was there in 1904; I know she worked for me in 1904.

Q. Did you see her there at this place in 1904? A. Well, I could not say that I ever saw her there; I know she was at my house in 1904; I was sick myself all the summer, and I don't know that I went there.

Q. You don't recollect? A. No, sir; I don't remember.

Q. Did you see her there in 1905. A. Yes, sir; I saw her there.

Q. What time in 1905 did you see her there? A. All along through the summer she worked for me from the first of July until the 10th.

Q. She would come there to see you? A. Yes, sir; I was not able to go there at the time.

Q. You had no conveyance? A. No, sir.

Q. You had to walk? A. Yes, sir.

Q. It was only in the summer that you went there?

A. No, sir; I was in there in the winter time.

Q. You think you were there in the summer of 1905? A. Yes, sir.

Q. How often? A. I could not say how often; two or three times that summer.

Q. Didn't you ever fish in Massey Lake? A. No, sir, we fished in Village Creek.

Q. A good many people came there to fish in Moosey

(perhaps Massey) Lake? A. Yes, sir, people that lived on the lake fished in the lake and people that lived on the creek fished in the creek.

Q. In the summer of 1905 you went there? A. Yes, sir.

Q. Did you see the negro there in 1906? A. Yes, sir. They were there in 1906.

Q. You are sure of that? A. Yes, sir, I know they were there at that time.

Q. When were you there in 1906? A. Well, I could not say, several times during the summer and spring.

Q. Were they living in the house? A. Yes, sir, they always lived in the house.

Q. Is it not a fact that Sim Collins was a superstitious negro, and would not live in the house and lived in a tent? A. No, sir, I don't think he lived in a tent.

Q. Did you not hear about Sim being so superstitious that he would not live in the house and Danziger furnished him a tent to live in? A. No, sir. We would go back and fry our fish there. He may have slept in a tent. I don't remember seeing a tent there; I don't remember seeing it.

Q. In 1907 were you there? A. Yes, sir, I was there the morning they left there.

Q. What date was that? A. It was in May, I don't remember what day.

Q. Where did they go, to Oklahoma? A. Yes, sir.

Q. They did not have much to move? A. I don't know whether they moved anything except themselves.

Q. That is about all you know? A. Yes, sir.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. When you first moved to the Montgomery league did you live on Massey Lake? A. No, sir, we later moved to the Lake.

Q. And there you lived until you moved to Silsbee? A. No, sir, we moved there in February or March and stayed there until the 13th of July, and moved to where we were living when my husband died.

Q. You moved to the lake and back to the Salher place? A. Yes, sir.

Q. How far is the lake from the sand pit? A. About two miles.

Q. After you went to Silsbee you were back there in 1910? A. Yes, sir.

Q. And you found Mead still there? A. Yes, sir.

Q. What was he doing there? A. Loading cars that I saw there.

Q. These times you were there fishing, did you see anything going on down there? A. Yes, sir, they were loading cars; sometimes they had no cars in there, but most of the time they were loading cars.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. About how often during each summer would you go there? A. I could not say, once or twice and sometimes oftener, and sometimes not so often.

S. A. McNEELEY, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. What is your business? A. I am manager of the tie department of the Kirby Lumber Co.

Q. How long have you been manager? A. Since its organization.

Q. That was in 1901? A. Yes, sir.

Q. July, 1901? A. Yes, sir, I think so.

Q. What was your business or occupation prior to July, 1901? A. I was manager of the John H. Kirby Tie Co.

Q. What was your occupation prior to that? A. Several occupations.

Q. That accounts for all the time you have spent in this country? A. No, sir, I was manager of the Texas Pine Land Ass'n and superintendent of construction of the G. B. & K. C.

Q. You were superintendent of construction of the G. B. & K. C. Railroad? A. Yes, sir, my services commenced in 1893.

Q. Your services commenced in 1893 with the railroad? A. Yes, sir.

Q. Do you know when the G. B. & K. C. crossed Village Creek? A. No, sir, not the exact date; it is a matter of record, it was in December, 1903, or January, 1904.

Q. Do you know where the sand pit is just beyond Village Creek on the Santa Fe Railroad? A. Yes, sir.

Q. Do you know what league of land it is on? A. The Charles A. Felder.

Q. How long have you known that sand pit? A. Since 1892.

Q. You mean you have known the property there? A. Yes, sir. That sand pit has been there since the last of 1893, or the first of 1894.

Q. Relative to the time the G. B. & K. C. crossed Village Creek, what time was it opened? A. Immediately.

Q. Do you know who opened and operated it? A. It was under my supervision for the railroad company.

Q. State whether or not any arrangements were made by the railroad company with any person or corporation? A. With Mr. Kirby through the Pine Land Ass'n for the ballasting of the road between Pine Island and Beaumont.

Q. Were any arrangements made at that time for the sand for commercial purposes? A. I don't know.

Q. Did you work for the railroad in July, 1895? A. Yes, sir.

Q. State what was done with that sand pit during 1893 when you say it was opened until you terminated your services with the railroad? A. It was worked very near continuously.

Q. After July, 1895, what was your connection with it? A. After July, 1895, I had no connection with it until 1899.

Q. Where were you during that period? A. My wife was sick, and I was traveling all the time backwards and forwards. I was in the territory occasionally but not continuously.

Q. From 1895, until 1899, your wife was sick? A. Yes, sir.

Q. You became familiar with the operations of the pit in 1899? A. Yes, sir, and 1900.

Q. What was your connection with it then? A. None at all.

Q. What were you doing then? A. I was managing

the John H. Kirby Tie Co. and constructing a road from Roganville north.

Q. How often did you see the sand pit during those days? A. I suppose once a week.

Q. What was going on then when you saw it? A. Sand was being removed I suppose for commercial purposes.

Mr. Gordon: Don't state anything you don't know; your supposition would not be evidence.

Q. Sand was being removed? A. Yes, sir.

Q. That was in 1899 and 1900; have you known the sand pit since then? A. Yes, sir.

Q. What have been the conditions there since 1900? A. Practically the same all the time.

Q. They were taking sand out of the pit? A. Yes, sir. I could not say it was continuously. I saw them taking it out probably every time I passed there; I noticed the work going on all the time.

Q. Every time you passed there? A. No, sir, not every time, very near every time.

Q. Do you know anything about timber being cut from the Felder league? A. Yes, sir.

Q. Who cut that timber? A. It was done under my supervision the first of it in 1904.

Q. By whom? A. By the Texas Pine Land Ass'n under contract with the Reliance Lumber Co.

Q. The Texas Pine Land Ass'n claimed the land and made the contract? A. Yes, sir.

Q. Was it in writing? A. I suppose it was.

Mr. Gordon: I object to it then.

The Court: He can prove the fact of the existence of the contract.

Q. How long did it take to cut that timber? A. I could not tell you, probably six to nine months. The contract was to cut the logs 16 feet at the but. We only cut float logs at that time.

Q. Do you know of any other timber being cut? A. Yes, sir; I cut ties off of it in 1901 and 1902.

Q. For whom? A. The Kirby Tie Company, and also a little later in 1904, I think.

Q. Do you know anything about a house being built at that sand pit by a man named Carroll? A. Nothing except I have seen the house there.

Q. Do you remember when it was built, that is, the Carroll house? A. No, sir; I don't remember; a long time ago; I don't remember the date at all.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. The road did not actually cross the creek on the trestle until January, 1894, did it? A. I would not be positive about it. The latter part of 1893 or the first months of 1894; that is a matter of record and I have paid no attention to it.

Q. The road got across on the north side and skirted along the sand bank, didn't it, and went to the east of it and encroached on it a little? A. No, sir; the sand bank was on the west side.

Q. Was not the track laid right east of the sand pit? A. The track was east of the sand pit.

Q. And practically against it? A. Yes, sir.

Q. You were only interested in the building of that track through there and taking the sand on the right-of-way

and adjoining the right-of-way to build the road? A. Yes, sir; after it was built to ballast; we took it not only on the right-of-way but anywhere else.

Q. You did not stop when you got to the right-of-way? A. No, sir; we had arrangements to take all we wanted; we had the steam shovel in there.

Q. The steamshovel was not in there but thirty days was it? A. Yes, sir; it was.

Q. How long was it in there? A. I could not say; that is a matter of record; it was there several months.

Q. First and last? A. Yes, sir; at one time.

Q. What year was that? A. 1894.

Q. 1894? A. Yes, sir.

Q. What was it doing in there? A. Taking out sand and loading sand.

Q. You had a track practically parallel with the main line. The spur bore right around the edge of the sand pit and the steam shovel was scooping that sand off at the edge of the track? A. Yes, sir.

Q. Was not nearly all of that spur for some distance on the railroad company's right-of-way? A. I would not be positive about that; I don't know whether all of it was or not.

Q. You don't know anything about it after the summer of 1895? A. Yes, sir; I know something of it after that, but I was not connected with it after that.

Q. You went back about 1899? A. Yes, sir.

Q. You were working on the upper end of the line? A. I was all the way from Beaumont to the upper end of the track, the extreme end.

Q. Whenever you felt like getting ties there, you

would move a crew in? A. Yes, sir; whenever I made arrangements to do it.

Q. You were doing that for the Kirby Tie Company?

A. Yes, sir; part of the time for the Tie Co., and part of the time for the Kirby Lumber Co.

Q. Is it not a fact that for as much as three months at a time a car of sand would not be removed from there? A. I could not say; I am not competent to testify about it.

Q. You had nothing to do with that sand all during that time? A. No, sir; not in 1895.

Q. When you saw it it was going through there on a train looking through a car window? A. Yes, sir; and on horse-back and afoot.

Q. You don't know how much time there was between the takings of sand out of that pit, do you? A. No, sir.

Q. You cut some 16 inch floating timber from the Felder league in 1894, and put the timber in Village Creek and floated it down? A. Yes, sir. We put it in at College Ferry.

Q. Is it not a fact that you were not on the Felder league exceeding three months altogether? A. I could not say; I didn't keep a record of it. We had several crews that were working continuously and I did not keep a record of it, and could not say; it might have been three months or several months.

Q. You were working from the Van Minter league to Silsbee? A. Yes, sir.

Q. Is not that also true in regard to the ties you made? A. I could not say; I think from two leagues in there.

Q. How many ties, how many leagues did you get ties from in there? A. Two, the Montgomery and Felder.

Q. Did you not make ties off the Mark M. Bradley?

A. No, sir; I don't think so; that is a matter of record.

Q. Is it not true as far as the Felder is concerned that you were not in there making ties altogether exceeding three months? A. No, sir; that is not a fact.

Q. Is it not a fact that your tie making was to the southeast of Massey Lake on the Montgomery league? A. No, sir.

Q. Were not the Slavonians in there? A. Yes, sir; all nationalities.

Q. You never had a camp on the Felder did you? A. Yes, sir.

Q. When? A. In 1901 or 1902.

Q. What time in 1901 did you have a camp there? A. Probably the whole year.

Q. Where was it? A. I cannot tell you just exactly where it was; the place is still there on the slough about a mile and three quarters from the sand pit.

Q. That would be in between Massey Lake and Village Creek? A. Yes, sir.

Q. You went in there at what time? A. In 1901.

Q. What time in 1901? A. I could not tell you.

Q. Was it in the summer? A. I think in the fall or winter of 1901.

Q. Along about October or November? A. I don't know exactly when it was; those things are all matters of record.

Q. When did you go out of there? A. Some time in 1902.

Q. About February, 1902? A. I don't know; I would not say as to that.

Q. How many ties did you cut there? A. I could not tell you; I never tried to keep a record of it; it is a matter of record in the office.

Q. How many trees did you cut off of there? A. I don't know.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. You say you had the tie camp between Massey Lake and Village Creek? A. Yes, sir.

Q. Some of the houses are still there? A. Yes, sir.

Q. When were you last there? A. Two years ago.

Q. Was there anyone living in them? A. No, sir; not at that time.

Q. Did you leave anybody there when you quit cutting ties? A. I paid no attention to anything of the kind. It was shacks we built out of tie slabs.

Q. Did you have permission from anyone to cut ties from that league? A. Yes, sir.

Q. From whom? A. From the Houston Oil Co., and prior to the sale to them, from the Texas Pine Land Ass'n.

Q. You said just now that you had arrangements to take all the sand you wanted? A. Yes, sir.

Q. With whom was that arrangement made? A. The Texas Pine Land Ass'n.

H. M. RICHTER, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Where do you live? A. Houston, Texas.

Q. Where did you reside before you went there? A. Lavaca Co.

Q. Have you any connection with the Houston Oil Co.? A. Yes, sir.

Q. What connection? A. Land and Tax Commissioner.

Q. How long have you been connected with the company? A. Four and a half years.

Q. There has been offered in evidence in this case a purported deed from Charles A. Felder to John A. Veatch, purporting to be dated on the 18th of June, 1839, and purporting to have two names signed to it as witnesses, one W. B. Barnett and the other Samuel Palmer. I will show you the names there? A. Yes, sir.

Q. I will ask you whether or not you have made any investigation as to those two purported witnesses, as to whether those men ever existed? A. Yesterday afternoon I spent practically all the afternoon examining the indices to the records of the office of the County Clerk and District Clerk of Harris County. I examined the index to the deed records, to the mortgage records, to the probate records and marriage records, and I went through the divorce records of the District Court, and I was unable to find any reference to them in the indices of any of the records.

Q. How far back did you go into the records of Harris County? A. As far back as the records existed.

Q. How far down this way '60 or '65, somewhere along there.

Q. You did not find any trace of either of the witnesses? A. No, sir.

Q. Was your examination thorough or otherwise? A. Yes, sir; I spent practically four hours there.

Q. You did that at whose request? A. Mr. T. M. Kennerly's.

Q. I will ask you whether or not you have made any search for a record or book showing the accounts between the Texas Pine Land Ass'n and the G. B. & K. C. Railroad? A. Yes, sir; I made a search among our land records at Houston and the Kirby Lumber Co., records.

Q. Where does the Kirby Lumber Co., keep its records? A. In the warehouse.

Q. Where? A. At Houston, as well as the records of the antecedent companies.

Q. You went to the warehouse to find the books? A. Yes, sir.

Q. Did you find the books? A. No, sir.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. How old are you? A. 29.

Q. What is your nationality? A. German.

Q. Why didn't you run out to El Paso and look at the records of El Paso County? A. I was not requested to do so.

Q. Judge Kennerly asked you to look at the records of Harris County? A. Yes, sir.

Q. Why didn't you go to San Antonio and look at the records there? A. I could not go to San Antonio; I was not asked until yesterday to look at the records.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. Were you in the Court room yesterday when Mr. Gordon complained because we did not examine the records of San Augustine and Nacogdoches Counties? A. No, sir.

Q. You did not hear that? A. No, sir.

JUDGE C. A. WOODS, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. There was introduced in evidence a day or two ago through your son, Mr. H. A. Woods, a plat of the Charles A. Felder league marked "Plat A," and it was admitted in evidence. I will ask you whether or not you had anything to do with the making of that plat? A. Yes, sir; I had to do with getting the data on the ground and also assisted in the office.

Q. You were with your son when he made the survey from which the plat was made? A. Yes, sir.

Q. What were you doing in connection with the work in the surveying of the lines? A. I carried one end of the chain and in the work at the sand pit I carried one end of the chain and had the rodding measurements.

Q. Were those various surveys and measurements and things you did there correctly done or incorrectly done? A. As correctly as we could do it.

Q. That is true with reference to all the work you did in connection with the Felder league and in connection with the sand pit? A. Yes, sir.

Q. Mr. Gordon in cross examination of your son, H. A. Woods, asked him why he did not meander the boundaries of the sand pit; do you know why you took the other course that was used? A. Yes, sir; I know.

Q. Why? A. We had two objects in view in doing the work and one was to get the area of the sand pit and the other was to get the volume of the sand removed. We could get the area in two ways, one by running the course and dis-

tance of the boundaries as we do in taking the meanders of a creek or an irregular piece of land, and the other was in the manner in which we did do it; either one would be correct if correctly done.

Q. You did do it correctly? A. Yes, sir; we did.

Q. What has been your experience as a surveyor? A. I have been working off and on since 1897.

Q. I will ask you if these red places on this plat correctly represent the excavations or sand pits you found there on the Felder league? A. Yes, sir; it does.

Q. What part of the Felder league is that on? A. On the northern part, the north two-thirds.

Q. Mr. McClellan was with you? A. Yes, sir; he carried the other end of the chain with me.

Q. You are one of the Houston Oil Co. fellows Mr. Gordon was talking about yesterday? A. Yes, sir.

Q. How long have you been in the employ of the Houston Oil Co.? A. Since April, 1906.

Q. What are your duties? A. I am at present in the inspection department of the Houston Oil Co.

Q. There has been offered in evidence here a purported deed under which the plaintiffs and interveners claim. On that deed the names of a couple of men appear in the place where the names of witnesses ought to be on a deed, the purported names being W. B. Barnett and Samuel Palmer. I will ask you whether you have made an investigation to determine whether or not those two men actually existed? A. Yes, sir; I have made some investigation.

Q. What investigation have you made? A. I investigated the records of Jefferson County.

Q. What records of Jefferson County did you investi-

gate? A. The index to the deed records, the District Court minutes, the probate court minutes, the marriage records and the mortgage and brand records, the mark and brand records.

Q. The mark and brand records of cattle? A. Yes, sir; stock.

Q. Did you find the names of W. B. Barnett or Samuel Palmer? A. No, sir; I did not.

Q. How far back did you go? A. I went back to the beginning of the first records of Jefferson County.

Q. Do you remember how far back that was? A. No, sir; I don't remember the date, it occurs to me it was in 1840.

Q. You went back as far as the records went? A. Yes, sir. I took some of them to date and some to a few years back.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. That was Jefferson County? A. Yes, sir.

Q. Why didn't you run out to San Antonio and look at the records? A. I was not requested to do so.

Q. Judge Kennerly asked you to look at the records here? A. Yes, sir.

Q. When did you do that? A. The first of this week.

Q. How long were you doing that? A. An hour or two assisted by the clerk or his deputy.

Q. You took a flying trip to the court house and spent an hour or two looking over the records? A. Yes, sir; I walked there.

Q. Did you ride back? A. No, sir; I walked down there and walked back.

Q. Now, you and your son went out to what Mr. McClellan pointed out as the northwest corner of the Felder league? A. Yes, sir.

Q. Is it not a fact that the northwest corner is there in the middle of Isaac Walton's field? A. I don't know Isaac Walton.

Q. Old man Walton who fishes a good deal? A. We went in a field.

Q. You understood it was Mr. Walton's field? A. No, sir.

Q. Southeast of that corner was his house? A. Where?

Q. Southeast of that corner, a very old house? A. Well, the only fields we passed in going there looked to be old settled fields.

Q. Describe that corner? A. There was nothing there. The point we went to was in a field.

Q. How was the field fenced, with old rails? A. I don't recollect the fencing.

Q. When you measured the sand pit you measured to the top of the hill, didn't you? A. We measured across and the depth of the cut, I believe.

Q. How many Houston Oil Co. timber agents and inspectors have they got in Newton County?

Judge Kennerly: We object to that as immaterial to any issue in the case. I will tell you if you want to know.

Objection sustained.

Q. Well, why didn't you get some disinterested people around there to do this work rather than the agents of the Houston Oil Co. from the different sections of the country?

A. If you refer to the measurements, we could do it as well as anybody; we are employed to do their surveying.

Q. Is it not a part of your business also to hunt evidence for the Houston Oil Company in all its litigation?

A. We do more or less of that work when requested to do so.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. Are you financially interested or otherwise in this case? A. No, sir; nothing except as employe to employer.

Q. Is there anything about this plat of the sand pit or your work or your son's work or Mr. McClellan's work that you are trying to mislead the jury about? A. No, sir.

Q. Did you use your best efforts? A. Yes, sir; the very best we could do.

Q. Your examination of the record was that thorough? A. Yes, sir; as far as I knew how to make it, and I asked the clerk if he knew of any other records, and he said he knew of nothing else except what we investigated.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You did not look for William A. Daniel, did you?

A. No, sir.

Q. Did you look in any of the records for William

A. Daniel? A. No, sir.

Q. Did you look for John A. Veatch? A. No, sir.

Q. Did you not find that the Beaumont oil field was on the headright of John Allen Veatch? A. No, sir.

Q. Don't you know the John A. Veatch headright at Sindletop? A. Personally, I could not say, but I am under that impression.

Q. You have seen his name on the records frequently in this county? A. I don't know; I was looking for the other names and not his name.

Judge Kennerly: At this point we offer certified copy of a deed from the deed records of Jefferson County, dated April 20, 1840, from John Allen Veatch to John Wright Daugherty for 587.½ acres of land out of the W. W. Carroll survey in Jefferson County, recorded in Book E, pp. 427 and 428 of the deed records. We also offer in evidence certified copy of a deed from John A. Veatch dated January 30, 1846, to Mahala L. Sharp conveying the same property.

Judge Kennerly: We also offer certified copy of the opinion of the Court of Civil Appeals for the First Judicial District of Texas, rendered by Judge Pleasants, May 6, 1901, in the case of I. D. Polk v. Beaumont Pasture Co. Those documents are offered for the purpose of rebutting the evidence offered by plaintiffs and interveners as to the character of John A. Veatch, and for the purpose of showing that the litigation arose over that land and that particular transaction.

Mr. Gordon: We object to these instruments, first, because they are irrelevant and immaterial; second, as hearsay declarations; and, third, as incompetent for any purpose, and not tending to prove or disprove any fact in issue in this case.

The Court: The general reputation of John A. Veatch is offered on the issue as to whether the deed offered in evidence from Felder to Veatch is genuine or a forgery. It is admitted for that purpose. Of course within proper limitations defendants are entitled to offer any evidence

that would be in rebuttal of that general reputation. I do not think with either side that I should absolutely for a moment limit the introduction of testimony, but each case must stand on its own circumstances, but where the transactions inquired about are remote in point of time, I think it proper that wider latitude be permitted. By this record here you offer to show that on the 20th of April, 1840 Veatch conveyed a certain tract of land to a man named J. W. Daugherty, and then you propose to show that on November 9, 1846, six years afterwards, he conveyed the same tract of land to M. L. Sharp, and then you offer to show that a much later date the two titles created to the same land were the subject of litigation, and you offer that to rebut the testimony offered by the plaintiffs as to the character of Veatch, and you state that this transaction constitutes an impeachment of the testimony of the witnesses who testified to his good character on the ground that he was not an honest man if he conveyed the same land twice. I am inclined to think the testimony is too remote and I sustain the objection.

Defendants except.

E. H. HOBSON, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Your name is E. H. Hobson? A. Yes, sir.

Q. Where do you live? A. At Woodville, in Tyler County

Q. How long have you lived there? A. I have lived in Tyler County all my life, and at Woodville about 10 years.

Q. Did you ever hold an official position there? A. Yes, sir.

Q. What position? A. County surveyor.

Q. How long? A. Six years.

Q. What are you doing now? A. Working for the Houston Oil Co., in the inspection department.

Q. There has been offered in evidence in this case a purported deed from Charles A. Felder to John A. Veatch. On that deed appears the names of two purported persons, W. B. Barnett and Samuel Palmer, purporting to be witnesses to that deed. I will ask you if you have made any investigation of any kind to ascertain about any records? A. Yes, sir.

Q. Where? A. The Tyler County records and the Menard County records.

Q. Are the Menard County records in the custody of the County Clerk of Tyler County? A. Yes, sir.

Q. What did you examine? A. The indexes of the deed records, of the minutes of the District Court, the marriage records, and also examined each instrument in Book A of the Tyler County records and also Book A of the Menard County records.

Q. Book A of the Menard County Records and Book A of the Menard County Records are the oldest there? A. Yes, sir.

Q. You thumb-paged both of those books? A. Yes, sir.

Q. I will ask you whether or not you found any record of the name of W. B. Barnett or Samuel Palmer? A. Yes, sir.

Q. In what connection? A. They were witnesses to a deed—

Mr. Gordon: The paper itself would be the best evidence.

Q. Is that what you found? A. Yes, sir; a certified copy of it.

Q. A purported deed from Chas. A. Felder to John A. Veatch? A. Yes, sir.

Q. Is that all you found? A. Yes, sir; that was the only instrument on which I found the names.

Q. The only place you found those names was on the same deed on which they are relying in this case? A. Yes, sir.

Q. Was your search thorough? A. Yes, sir; I did make a thorough search.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You never made any search in San Antonio or El Paso? A. No, sir.

Q. These people purported to sign the deed in Jasper County, why didn't you go there? A. I was not requested to go there.

Q. Why did you not go to San Augustine or Nacogdoches where they have a number of archives of old settlers? A. I was not asked to go there.

Q. You knew that Tyler County was not organized until 1846? A. Yes, sir; I knew that.

EUGENE McMAHAN, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly;

Q. Your name is Eugene McMahan? A. Yes, sir.

Q. Where do you live? A. At Kirbyville in Jasper County.

Q. How long have you lived there? A. For the past nine years.

Q. Where were you raised? A. Principally in Louisiana.

Q. How long have you been in Texas? A. 20 years.

Q. Have you lived in Jasper County during that time?
A. Yes, sir; Jasper and Newton.

Q. There has been offered in evidence in this case a deed purporting to have been executed by Charles A. Felder to John A. Veatch, and on that deed two witnesses, W. B. Barnett and Samuel Palmer appear as witnesses. Did you make any investigation of any records to see if you could find the names of those persons? A. Yes, sir; I examined the indexes of the deed records of Jasper County and the probate records and the marriage records, and I also investigated the surveyor's records, and the records of the county and the records of marks and brands.

Q. When was that investigation made? A. The 24th of this month.

Q. That was about Monday? A. No, sir; Tuesday of this week.

Q. Was your investigation thorough or otherwise? A. Yes, sir; it was thorough.

Q. Those marks and brands records, how far back did they go? A. 1850.

Q. The records you examined, were they or not the oldest records of the county? A. Yes, sir; and they commenced in 1849, and I examined them on up to 1880.

Q. It has been agreed in evidence here that the records of this county were destroyed in 1849; you did not find any records previous to that time? A. No, sir.

Q. Is it not a fact that there are many deeds spread upon the records which have been re-recorded since the records burned?

Mr. Gordon: Just what you know.

Q. (Question repeated to the witness) What is your answer to that? A. It was my understanding that was the case.

Mr. Gordon: State what you found? A. Well, I found the deeds.

Q. Did you find those names on the records? A. No, sir.

Q. Did you find any deeds dated in April, 1849? A. No, sir, I never noticed any.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Is that all the investigation you made to try to locate W. B. Barnett and Samuel Palmer? A. No, sir.

Q. That is not all? A. No, sir.

Q. Where else did you go? A. I talked to some very old men of Jasper County.

Q. Who? A. T. H. Holmes.

Q. Where does he live? A. He was born and raised in Jasper County

Q. How old is he? A. 81.

Q. Who else? A. I talked with old man Mal Morgan.

He came there in 1850 and is close to 90 now. I talked to Uncle Dave Smith, another old man and Barrow.

Q. Where did Smith come from? A. Georgia.

Q. When? A. In the 60s sometime.

Q. Who else? A. I believe that was all.

Q. You talked to Mr. Barrow? A. Yes, sir.

Q. How old is he? A. He is 75.

Q. Where did he come from? A. I don't know. I asked them if they ever heard of these parties and they said they had not.

Q. That was the extent of your search? A. Yes, sir.

Q. Are you in the employ of the Houston Oil Co.? A. Yes, sir.

Q. In what County? A. Jasper County.

Q. Did you make any inquiry for William A. Daniel?

A. In one instance I did.

Q. Who did you inquire of? A. I asked Uncle Tom Holmes if he knew a man named Daniels.

Q. Don't state what he said. He was the only one you inquired of? A. Yes, sir.

Q. You know that the company's title rested on Wm. A. Daniel? A. Well, not altogether.

Q. Outside of the question of limitation, you knew it didn't you?

Judge Kennerly: We object to that; that is a question of law.

The Court: The jury will get the law from me.

Q. Was that your opinion? A. No, sir, not altogether.

Q. Did you search anywhere else for Wm. A. Daniel?

A. No, sir.

Q. Did you find anything on the records of Jasper County about John A. Veatch? A. No, sir, I don't think his name appeared on any of the records I looked at.

Q. You did not make any inquiries about Dr. Veatch?
A. No, sir, I did not.

Q. You know that Dr. Veatch's old house is still standing up there on the McGallen league don't you? A. What County is that in?

Q. Jasper County? A. No, sir, I do not.

Q. You know a place called Crotona that Dr. Veatch lived at? A. No, sir, I don't.

Q. You don't know that, you have never been there?
A. No, sir.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. This man Barrow that you were asked about, how old is he? A. 75 or 80; he is a very old man, I did not ask his age.

Q. Do you know any older men in the County than the four you inquired of; if so, who are they? A. I don't know any older except Uncle Charley Hancock, I did not see him.

Q. I will ask you whether you were able to find any trace of W. B. Barnett and Samuel Palmer? A. No, sir, I did not.

J. P. McMAHAN, JR., a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Your name is J. P. McMahan, Jr.? A. Yes, sir.

Q. Where do you live? A. In Newton County.

Q. How long have you lived there? A. I have lived in

the town of Newton since 1901, and I was born and raised in Newton County.

Q. What is your business? A. Well, I am in the real estate business, abstract business, farming, stockraising and merchandising.

Q. You are not one of the fellows employed by the Houston Oil Co.? A. No, sir, not under a salary.

Q. Are you employed in any way? A. No, sir.

Q. There has been offered in evidence here what purports to be a deed from Chas. A. Felder to John A. Veatch, and on that old document there purports to be two names signed apparently purporting to be witnesses to it, W. B. Barnett and Samuel Palmer. I will ask you whether or not you have made any investigation of any records or otherwise to get any trace of those two men? A. Yes, sir, I made an investigation of the records of Newton County.

Q. When? A. Last Monday.

Q. This week? A. Yes, sir.

Q. What did you investigate? A. The index to the deed records, probate records, marriage records and marks and brands records.

Q. Were they or not old records, where did you commence? A. I commenced with index No. 1.

Q. How far down did you go? A. I run that down to index No. 3 which carried it to 1880.

Q. You ran the indexes to 1880? A. Yes, sir, the deed records especially.

Q. Well, did you find either of their names on the records? A. No, sir, I did not.

Q. Was your investigation thorough or not? A. Yes, sir, it was.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. What kin are you to the other McMahan? A. We are distant cousins.

Q. When did you cease to work for the Houston Oil Co.? A. I have never been regularly in their employ.

Q. Just occasionally they would hire you? A. Yes, sir, to make a survey of land or assist in the location of some survey.

Q. In addition to the other things you do, you are a sort of land man? A. Yes, sir, a kind of one.

Q. You do surveying? A. Yes, sir.

Q. And a little insurance occasionally? A. No, sir.

Q. Are you a Notary Public? A. Yes, sir.

Q. You do a little farming? A. Yes, sir.

Q. And a little stockraising? A. Yes, sir.

Q. How long were you engaged in looking over the records of Newton County in making this investigation? A. Possibly something like three or four hours.

Q. Did you find Dr. Veatch on there? A. I never made any search for him; I was just asked by Judge Woods to made search for the two parties, Barnett and Palmer.

Q. You did not look for William A. Daniel? A. No, sir, I did not know anything about it.

Q. Newton County was not organized for many years after the deed was signed? A. I never saw the deed.

W. A. McCLELLAN, a witness for the defendant, testified as follows:

Questioned by Judge Kennerly:

Q. Your name is W. A. McClellan? A. Yes, sir.

Q. Where do you live? A. At Silsbee, in Hardin County.

Q. You are in the employ of the Houston Oil Co.? A. Yes, sir.

Q. How long have you been in the employ of the company? A. Since April, 1906.

Q. April, 1906? A. Yes, sir.

Q. Did you know Col. P. A. Work? A. Yes, sir.

Q. Is he living or dead? A. He is dead.

Q. How long has he been dead? A. Something over a year.

Q. Do you know the location of the Lancaster survey in Hardin County? A. Yes, sir.

Q. Do you know whether or not of your own knowledge it was in conflict with the Charles A. Felder? A. Yes, sir.

Q. To the extent of how many acres? A. Something less than 300, between 290 and 300 acres.

Q. What part of the Felder does it conflict with? A. The southwest portion.

Q. The southwest or the northwest? A. The northwest portion of the Felder is in conflict with the southwest portion of the Lancaster; I will take that back, the southeast portion of the Lancaster conflicts with the northwest portion of the Felder.

Judge Kennerly: For the purpose of showing outstanding title with which the plaintiffs and interveners do not connect, we offer in evidence certified copy from the General Land Office of the field notes of the A. Lancaster survey, showing a survey on July 12, 1835, and in connection therewith certified copy of the original title to the Lancaster showing it

was patented October 20, 1835, which shows that the survey was prior to the survey of the Felder. We offer it for the sole purpose of showing outstanding title with which the plaintiffs and interveners have not connected as to the particular portion of the survey in conflict with the Lancaster.

Mr. Gordon: We object to it as irrelevant and immaterial.

Judge Kennerly: We want the record further to show that the original application of Lancaster was filed May 26, 1835, and was presented to the Commissioner May 27, 1835. The survey was made July, 12, 1835 and the grant was issued October 20, 1835.

The Court: Any further examination of the witness?

Judge Kennerly: Yes, sir.

The Court: Go ahead.

Q. I will ask you whether or not you were present when Judge C. A. Woods and H. A. Woods made the survey of the sand pit in the Felder league? *A.* Yes, sir.

Q. What did you have to do with the matter of that survey? *A.* I helped to make the measurements and did part of the flagging.

Q. You did part of the flagging? *A.* Yes, sir, taking the rod measurements.

Q. This question applies to everything you did on that occasion in reference to the location of the Felder league or any part of it or the sand pit and the measurements and everything: Did you or not correctly do the things you did there? *A.* Yes, sir.

Q. Do you know where the north line of the Felder is? *A.* Yes, sir.

Q. How long have you known that? A. About eight and a half years.

Q. Were you or not on that league with the two Messrs. Woods? A. Yes, sir.

Q. You know that that was the Felder league you were on? A. Yes, sir.

Q. And where the north line is? A. I know it is the line recognized by all surveyors.

Q. Do you know where the sand pit is on the Felder league do you know that locality there? A. Yes, sir.

Q. How long have you known it? A. I have known that since April or May, 1906.

Q. That was about the time you went to work for the Oil Company? A. Yes, sir, shortly afterwards. I know the place many years before that not as a sand pit; I did not know it as a sand pit prior to 1906.

Q. You did not know there was a sand pit there? A. No, sir.

Q. How did you happen to know about the sand pit in April, 1906? A. I had some instructions from the receivers of the Oil Co. to make some investigations, but I don't recollect what it was.

Q. Who did you find there? A. A negro named Sim Collins.

Q. Did he have a wife? A. Yes, sir.

Q. Was she there? A. Yes, sir, she was.

Q. Who was with you? A. Mr. Hooker was there. I went down on the passenger train and he came afterwards on the Kirby Logging train.

Q. Where was Collins and his wife living? A. They

were living in the house that stands there today near the track.

Q. Have you or not known that sand pit and the property surrounding Fletcher since that time? A. Yes, sir.

Q. What have been the conditions there in reference to 1906? A. There has been some one living there all the time.

Q. How long did Collins live there, do you know? A. I don't recollect just when Collins left there; I don't know that I knew when Collins left; I remember when the house was built, I don't remember the date.

Q. Do you know who took Collins' place? A. No, sir, I do not.

Q. Did anyone? A. Yes, sir, a white man, I don't know his name.

Q. What has been the condition there since 1906 in reference to taking out sand at that place? A. It has been continuous since that time.

Q. I will ask you if you ever made a search for the books of the Texas Pine Land Ass'n regarding that sand pit? A. Yes, sir.

Q. Where did you search? A. At Silsbee.

Q. Whereabouts at Silsbee? A. Well, I went to the manager of the Kirby Lumber Co.

Q. What did you do? A. They cited me to a pile of old books in an old house, and I went and examined the old books.

Q. Did you find them? A. I found some books.

Q. Did you find the books relating to the sand pit? A. I did not.

Q. They were just the records of the old companies the Kirby Lumber Co. acquired? A. Yes, sir.

Judge Kennerly offers in evidence agreement between counsel as to reading from the printed record in this case on appeal. I will just file it as of this date. (It is filed by the Clerk.)

JUDGE T. M. KENNERLY, a witness for the defendants, testified as follows:

Questioned by Mr. Lee:

Q. State your name? A. T. M. Kennerly.

Q. You are a representative of the Houston Oil Company? A. Yes, sir, one of the attorneys.

Q. State generally your business as attorney, what do you do? A. Try suits for them and represent them generally as an attorney.

Q. Are you familiar with the files and records of the Houston Oil Company relating to the Felder survey? A. Yes, sir, I am.

Q. How long have you been connected with the company? A. I became Land Commissioner for the company in 1906. I was Land Commissioner for a year or so, and then became local attorney, which position I held until the receivership; I was out two months, and went back to the employment of the company as local attorney, and was local attorney until the 1st of April of this year, when I became one of the general attorneys, and during that time I became familiar with the files of the company in reference to the Charles A. Felder league. However, I did not become familiar with the files and title until about 1909. At that time I examined back and became familiar with them.

Q. Was there anything that caused you to familiarize yourself with them? A. Yes, sir, a suit by Ellen Lee Mason involving a part of the Felder league not now in controversy in this suit.

Q. In your relation as attorney for the company, I will ask you when you first became familiar with the claim now being asserted by the plaintiffs and interveners in this case? A. I became familiar with the alleged chain of title under which they claim about the time the Ellen Lee Mason suit was filed, but I never heard of the claim being made by the plaintiffs and interveners until about the 9th of April, 1909, when I learned there was a claim being asserted by the plaintiffs in this case. I do not think I at that time learned that interveners were asserting any claim.

Q. That was your first information as to the adverse claim now being asserted by the plaintiffs in this case? A. Yes, sir, that was the first information I had.

Q. How did you receive that information? A. I received it through a letter from the receiver of the oil company from Mr. John H. Brooks of Beaumont; that is the first I know about it or anything in the files of the company indicating any claim by the plaintiffs in this case. I have a letter here dated April 9, 1909. We do not expect to offer it, but I refresh my memory from it.

Q. Had you known of any adverse claim being asserted other than that stated in the letter? A. Except the Ellen Lee Mason case, and that was known as the Pollard claim, and that was a different chain of title from the one being asserted by the plaintiffs and interveners here. The Ellen Lee Mason claim and that claim were the only ones I had heard of.

Q. There has been introduced in evidence in this case a purported deed— A. I want to say before you pass on to that that not only was the letter from Mr. Brooks the first claim that came to me or to the oil company, but there was nothing in the files of the company showing the claim of plaintiffs and interveners.

Q. There has been introduced in evidence in this case a purported deed dated June 10, 1839, purporting to be from Charles A. Felder to John A. Veatch. I want to ask you when you first had any knowledge or information in reference to this old purported deed, which I now hand you? A. In the investigation and trial of the Ellen Lee Mason case, somebody, perhaps I did, ran across some old correspondence which showed that there were some old papers of some sort in the possession of a man named Walker, up in Connecticut. That was some time in 1909, or 1910, I think in 1910, that I first noticed that correspondence. I don't know where the correspondence came from. I was in New York City in 1911, on other business, and while there I went to Waterbury, Conn., to see Mr. Walker and found that he had in his possession this old purported deed. I will say I did not see him in Waterbury. He had gone to a football game and I arranged for him to meet me in New York the next day, which he did, and he showed me for the first time the deed from Felder to Veatch. That was the first time I ever saw it.

Q. You now have the deed in your possession? A. Well, it is in the possession of the Clerk of the court.

Q. I will ask you if you know how and in what manner that deed got into the possession of this court? A. I do not want to get in anything that is not admissible; I want to lead up to it.

Mr. Gordon: I object as immaterial and irrelevant in view of the fact that the record shows that Mr. Walker brought the deed here and delivered it to the court.

Judge Kennerly: I want to show why he came here.
Objection overruled.

Plaintiffs and interveners except.

The Witness: I arranged for Mr. Walker to come to Texas and bring the deed for the purpose of using it in the trial of this case—rather for the purpose of showing our theory of the case.

Mr. Gordon: What purpose he has is incompetent, irrelevant and immaterial and argumentative. I don't think he would be permitted to go further than to state that Mr. Walker came here.

The Court: The record shows that the statement was made a moment ago to the effect that the deed came to the court through Mr. Walker. He says he brought Mr. Walker here with the deed. Do you want to state your purpose.

The Witness: Yes, sir, I want to state that I brought him here to attack the deed as a forgery to show the difference in the signature. I say I brought him here. The legal department of the Houston Oil Co. brought him here, and the deed was here for the purpose of attacking it as a forgery and showing the difference between the signatures of the different parties who purported to execute it and their signatures.

Q. He came here at your instance? A. Yes, sir, and at the instance of the Houston Oil Co. We paid his railroad fare down and back; I don't think he charged anything for coming. He was anxious to make the trip; he had never been to Texas; that is the impression I have.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. When Mr. Walker appeared here he had this original deed and the original deeds down to William Walker, did he not; that is to say, he had the Spanish testimonio introduced in evidence in this case, did he not? A. Yes, sir, I think so. That is my recollection of it.

Q. He had also the original Spanish map accompanying the testimonio, didn't he, under the signature and seal of Jorge Antonio Nixon, Commissioner? A. He had the papers offered at the last term of court.

Q. Didn't he have that? A. I can not recall that; if the record shows it, he did. He had the testimonio, I remember that distinctly, about the map I don't recollect.

Q. The original Spanish testimonio? A. Yes, sir.

Q. He had this original deed? A. Yes, sir, he had the deed; I don't say it is an original deed.

Q. You have no doubt about it being an original deed? A. That is for the jury.

Q. He also had an original deed from John A. Veatch to Col. James Morgan? A. He had that deed. He had what purported to be original deeds down to his grandfather. He had the papers.

Q. He had the deeds and original papers? A. Yes, sir.

Q. Now, is it not a fact that I, myself, representing the plaintiffs in this case, put him on the stand and elicited from him practically all those papers and put them in evidence in this case? A. I think that is all you could have done.

Q. I did do it? A. Yes, sir.

Q. Did you not make the objections recorded in this

printed record to those papers? A. I was here sitting in the trial.

Q. You objected to the papers going in evidence? A. Yes, sir, on the ground that the deed was a forgery.

Q. The objections are recorded correctly? A. Yes, sir.

Q. When the testimonio was offered you objected to that? A. Yes, sir, I expect so, the record shows, but I have no recollection of the details.

Q. Then you objected to the Veatch deed going in evidence? A. Yes, sir, and we are objecting yet.

Q. You never changed your mind on that objection? A. No, sir.

Q. Then you objected to each of the other deeds as they went in evidence? A. Whatever the record shows. That has been two years; I have to refer to the record every few minutes. I know we objected very strenuously and particularly to the Veatch deed.

Q. You brought your witness here with the originals and we put him on the stand? A. I think you were up against it and it was about all you could do.

Q. On p. 99 of this record you made, one, two, three, four, five objections to the introduction of the deed? A. Whatever the record shows.

Q. Then when you came to the next deed from Veatch to Morgan you made four objections to that deed, didn't you? A. Whatever the record shows.

Q. They were all overruled? A. I have no independent recollection of it of course.

Q. Then when I offered the deed from Morgan to Lee you objected to that also? A. Yes, sir.

Q. You objected to that on the ground that it is wholly irrelevant and immaterial to any issue in the case, and further, that it does not come from the proper custody, and does not purport to convey the land in controversy at all? A. Yes, sir, but afterwards the Oil Co. offered it as an outstanding title, as against the interveners which we expect to do now.

Q. That was after I got it in? A. I don't know, the record shows.

Q. You made objections to every one of the deeds? A. Yes, sir, whatever the record shows.

Q. Now, coming down to the case of Ellen Lee Mason who recovered the 1850 acres of land—that is the Pollard record, is it not a fact that you did not make any defense of limitations in that case or introduce a single witness or contend for the use of the sand pit on the question of limitations.

Mr. Lee: We object to that for the reasons that the issues and parties involved in that case and this are not the same, and for the further reason that the land involved in that case and this is not the same.

Objections sustained.

Mr. Gordon: I ask as a part of the cross examination if it is not a fact that he individually introduced not a single witness on the contention that he had possession growing out of the use of the sand pit.

The Court: Yes, sir; in the Ellen Lee Mason case. Objection sustained.

Plaintiffs and interveners except.

The Witness: I did not try the Ellen Lee Mason case and I don't remember.

The Court: You can make the proof now since that statement.

Q. Is not that a fact then Judge? A. I did not try personally the Ellen Lee Mason case. I think Mr. McGown of San Antonio tried it, and the only way I could answer about the sand pit, and the only way I could answer about the sand pit would be by looking at the printed record.

Q. We have an agreement in this case to use that record? A. Yes, sir.

Q. Now, I will ask you, without introducing all the testimony given in that case, if it is not a fact that there was not a single witness in that case introduced by the Houston Oil Co., and its receiver on the sand pit as the basis of limitation?

Mr. Lee: We object to that question.

The Court: He says he don't know except from the record and I sustain the objection.

The Witness: I want to say so that the jury will understand me that that old purported deed from Felder to Veatch was brought to Texas for the purpose of attacking it as a forgery.

RE-DIRECT EXAMINATION.

Questioned by Mr. Lee:

Q. The numerous objections made to that deed and the other deeds as stated by counsel were made for what reasons generally? I will state it this way: Were those objections not made for the reason that those deeds introduced in evidence were the ones that were attacked as forgeries? A. I could not recall from memory the different objections made on the former trial of the case, but the objec-

tions made are shown in the record, and speak for themselves whatever they are.

Mr. Gordon: As part of my cross examination of this witness, and in accordance with the agreement of counsel in the case, I offer the entire testimony in this Ellen Lee Mason case on the defense of limitation.

The Court: I sustain the objection to that.

Mr. Gordon: I offer it on the proposition as bearing on the bona fides of the defense and to discredit the defense of limitations. We offer it to show that the identical questions were involved in that case for a part of this same land where the issues were identical on the title and limitations, and that they never made the contention that they had acquired title by limitations from the use of the sand pit.

Judge Kennerly: We make the further objection that this printed record, while it purports to show the evidence carried to the Circuit Court of Appeals in the Mason case, is not necessarily all the evidence introduced in that case. The court will recall that in an equity case you do not carry up the entire record unless you desire to do so.

Objection sustained.

Plaintiffs and interveners except.

H. J. WOODS, being recalled by the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. I will ask you whether or not you never made any search for the old GB&KC records as to the sand pit at Fletcher, and as to the dealings between that company and the Texas Pine Land Ass'n.? A. Yes, sir; I have.

Q. When did you make that? A. The first of this week.

Q. Where did you go? A. To the Calder station in Beaumont.

Q. At the division office of the Santa Fe? A. Yes, sir.

Q. What did you do? A. I made inquiries as to the records, and examined in company with Judge Newberry the old records in the office.

Q. What did you find? A. Well, we found some old records of the GB&KC Railroad, some old ledgers.

Q. Could you find the book which related to this particular transaction; what I mean is did you find books showing payments by the GB&KC to the Texas Pine Land Ass'n.?

A. Yes, sir; we found in these old ledgers amounts that had been paid to the Texas Pine Land Ass'n., by the GB&KC Railroad.

Q. Did you run back to see what those items were for? A. I tried to find the old journals that these items could be found in showing what items were about.

Q. Did you find them? A. No, sir; I did not.

Q. Did you make a thorough search for them? A. Yes, sir; particularly for the years 1893, 1894, 1895 and 1896.

Judge Kennerly: We offer the testimony of JOE BUMPSTEAD from the printed record on pp. 288 and others, beginning on p. 288:

Q. Where do you live? A. On Village Creek in Hardin County.

Q. What is your age? A. I will be 63 on the 26th of next January.

Q. 63? A. Yes, sir. I mean February.

Q. How long have you lived in Hardin County? A. It will be 63 years the 26th of next February.

Q. You were born and raised there? A. Yes, sir; on the same place I am now living on.

Q. How far do you live from the Felder league? A. I live on the west end of the Felder league, the west end covers the survey I live on.

Q. You have lived there 63 years? A. Yes, sir.

Q. You know a place on the east side of Village on the Felder league now called Fletcher Station? A. Yes, sir.

Q. That used to go by the name of some ferry in times past? A. Yes, sir.

Q. What ferry was that? A. Well, it went by the name of the Pickering Ferry a long time back there about 1856, and since 1856 it has been called the old Pickering Ferry, and it afterwards went by the name of the Cair Ferry.

Q. The last man that occupied it was named Cain? A. Yes, sir.

Q. Do you know of a widow lady that lived there at this place I speak of called the Fletcher Station or switch in 1873? A. Yes, sir.

Q. Who was that lady? A. Elizabeth Browning.

Q. Elizabeth Browning? A. Yes, sir.

Q. Know a man named P. S. Watts in Hardin County? A. Yes, sir.

Q. Do you know whether he acted as agent and repre-

sented T. J. Word in land matters? A. Yes, sir; he was agent for T. J. Word and also agent for Thomas Moore—I think his name was Thomas Moore, I am not sure.

Judge Kennerly: We read again from the testimony of the same witness beginning on p. 295 at the seventh question, omitting the cross examination down to p. 316, beginning with the fifth question on p. 316.

Objection sustained to the question on p. 316.

Q. Do you remember about when the G. B. & K. C. road was built through there across that league? A. I think it crossed through there in 1890 or 1891, crossed the creek; I am not positive whether it was 1890 or 1891, somewhere along about that time.

Q. Anyhow you remember the time, whether you have the exact date or not; you remember the fact that the railroad was built through there? A. Yes, sir.

Q. How far do you live from the place where the railroad crosses Village Creek? A. Well, it is about a half mile from my house on an air line, to the water tank I mean.

Q. Do you remember about how long it was after the railroad reached that point and got on the east side of Village Creek at the station which is now called Fletcher—how long after that it was that the operation of the sand pit there commenced? A. I think it was in 1892. It was either in 1892 or 1893, I don't think as late as 1893.

Q. Is that sand pit on the Fekler league? A. Yes, sir.

Q. Do you remember how long the operation of that sand pit continued? A. It has continued ever since it first commenced; it is running there yet.

Q. Ever since they first commenced? A. Yes, sir; it is still running.

Q. Where did the person or persons live that operated the sand pit, where did they live? A. Right on the side of the railroad there.

Q. Was there a house there? A. The first ones that went there lived in tents for about a year and they had no house there; they lived in tents.

Q. When was the house erected there in which the parties operating the sand pit lived? A. I think it was in 1893, in the fall of 1893.

Q. What kind of house was that? A. It was a little box house about 16x24, a two-room house.

Q. Did anybody live in it? A. Yes, sir.

Q. What did those persons do who lived in the house? A. The man attended to the sand pit, looked after the loading of the sand and shipping out the sand, and sometimes the man there run the pump, most of the time he ran the pump for the K. C. road.

Q. You say that this was in 1893 that the house was built? A. Yes, sir; I think in 1893.

Q. Was that on the right-of-way or off of the right-of-way? A. It was about thirty steps outside on the railroad right-of-way on the west side.

Q. Was that house on the league, the Felder league? A. Yes, sir.

Q. Do you know whether or not the person in charge there had anything at all in cultivation, any garden or potatoes or anything of that kind? A. No, sir; he didn't have anything in cultivation, no place there for cultivation,

right around there it is nothing but sand; he did not have any time to go any distance to cultivate the land.

Q. You have reference to the first person who took charge? A. Yes, sir.

Q. To what extent was the operation of the sand business carried on; was it loaded on railroad cars? A. Yes, sir.

Q. How did they manage to get it to the cars? A. They rolled it to the cars with wheel-barrows.

Q. I will ask you whether or not any switches were constructed there running out from the railroad track? A. Yes, sir; a switch for the sand cars; the cars were switched off on the sidetrack and loaded.

Q. I understand from your statement that there were switches running from the main track to the sand pit? A. Nothing there but the sidetrack to switch the cars on.

Q. What is the difference between a switch that they put the cars on and a sidetrack that they took the cars out there on? A. It is all the same thing, a sidetrack.

Q. Do you know approximately how many car loads of sand were taken out of there a month? A. No, sir; I don't. There were sometimes as little as two and sometimes as many as five a day, owing to the number of cars they could get to put in there.

Q. Was this operation of the sand pit a continuous operation or only periodical? A. It was a continuous operation. The sand pit hands stayed there all the time and worked there all the time.

Q. I will ask you to state whether or not this house after it was built there in 1893, I will ask you how long that

was occupied after it was put there? A. It is occupied yet.

Q. I will ask you to state whether or not it has been continuously occupied since it was put there? A. Yes, sir; somebody in it all the time.

Q. Is there or not also a pumping plant there? A. Yes, sir.

Q. That is different from the house you have reference to in which the parties live? A. Yes, sir.

Q. Is there also a little pump house near the pumping plant? A. The pump is inside the house, the boiler, engine, pump and all.

Q. That is the pump house? A. Yes, sir. It extends right on the right of way, right on the bank of the creek.

Q. That is another structure there, the house your statement has been about, you have reference to in which the operatives live? A. Yes, sir.

Q. Now, have you kept in touch with the situation there since the time you have first talked about? A. Yes, sir; I have been right there.

Q. Have you been in position to know whether or not that house has been continuously occupied as you have stated? A. Yes, sir.

Q. How often did you go down there? A. Maybe once a week or oftener than that sometimes. There was a station right there, and we got on the train there to go to Silsbee or Kountze or to come to Beaumont, a station right by the side of the track, and we went there all the time to get on and off.

Q. Do you remember the name of the first man there

that took charge of the sand pit in loading these cars, who lived in the house? A. Tom Carroll, I think.

Q. Do you remember a man named Purley, that lived there? A. Yes, sir; S. E. Purley, he run a team there.

Q. Did he live there before or after Mr. Carroll? A. Yes, sir; he was the second man to take hold of the pump, the first man that took hold of the pump stayed there a month or two, not very long, and he left because there was no house there for his wife and children, and old man Purley took his place.

Q. I will ask you whether or not you know of any tie-makers being established on the Felder league near the place? A. Yes, sir; there were tie-makers there.

Q. Please state when the first camp was established there? A. I think the first camp established there was in 1893; I am not sure it was in 1893, but I think it was.

Q. How long was it after the railroad reached that point? A. Well, about three years, if I am not mistaken; I think the railroad crossed there in 1890 or 1891, '91 I think the railroad crossed there; I am not sure, but I think the railroad had been across there about three years when the tie camp was established there.

Q. How far was this tie camp from the point we now call Fletcher on the east side of Village Creek on the Felder league? A. Well, I suppose it was about a quarter from where the station is, the tie camp.

Q. What did that tie camp consist of, whether houses or not? A. No, sir; they were not houses, little shacks and tents just like any other lot of men would go out in the woods and work. They did not have houses; they just put up little tie slab shanties, and some of them had tents.

Q. What were the people living there doing? A. Making ties.

Q. Making ties for whom? A. I think making ties for the K. C. road.

Q. Under whose permission, who was putting out the timber? A. I suppose making ties for the Santa Fe road.

Q. The Santa Fe railroad was taking up ties? A. Yes, sir.

Q. Who was the person putting out the timber through the tie man? A. I don't know, I think, if I am not mistaken-----

The Witness: I think W. W. Fortleberry was the contractor putting out the ties for the Santa Fe Company.

Q. Well, do you know who he was agent for in handling the timber? A. He was the agent for the Santa Fe Railroad Company, the Kirby Lumber Company, the Kirby Railroad Company at that time.

Q. Did you understand my question? I asked you who Mr. Fortleberry was putting out the ties to be used by, for whom he was acting as the owner of the timber? A. No, sir; I don't know who he was acting for.

Q. Do you know for whom he claimed to be acting there as agent, for whom he claimed to be acting as agent for the sale of the timber? A. He was acting as agent for John Henry Kirby.

Q. I asked you for whom Mr. Fortleberry claimed to be preparing the timber? A. He claimed to be Mr. John Henry Kirby's agent.

Q. John H. Kirby's agent? A. Yes, sir.

Q. I will ask you how long this tie yard was operated and how long this timber was being taken off of there, how

long that continued? A. They worked on the Felder league about four years.

Q. I speak now of the first camp near Fletcher; they were there about four years, you say? A. Yes, sir.

Q. I will ask you whether or not you saw another camp established on the Felder league at another point? A. Yes, sir.

Q. About how far from this first camp? A. About three miles.

Q. What direction? A. East.

Q. East? A. Yes, sir.

Q. About how long was that camp operated, how long did they work there? A. About two years.

Q. Somewhere near two years? A. Yes, sir.

Q. What kind of ties were they making there on that land? A. They were making cross ties, pine ties, eight foot ties 6 x 8.

Q. When you say the first camp was operated there about four years and the other one about two years, you mean they were operated continuously during those periods or only periodically?

The Court: How long was that camp operated?

The Witness: About six years altogether.

Q. Explain what you mean by altogether? A. I mean the first camp worked about four years before they quit, and when they quit some of the same hands commenced working at the other camp; some of the same hands that worked at the first camp moved to the other camp and went to work again and worked two more years there.

Q. I will ask you this question and see if it is objectionable. I want to make it plain when you say the first

camp was operated four years, I want to know whether that was continuously for four years, or whether off and on for four years. you may answer the question. A. Yes, sir; they worked continuously all the time.

Q. Now, with reference to the last camp, you say it was operated two years, do you mean that the operations were continuous for two years or periodical for two years?

A. It was continuous for two years.

Q. I will ask you what time intervened, if any, between the abandonment of the first camp and the commencement of operations at the second camp? A. I don't think there was any time; I think the second camp was established before they abandoned work at the first camp; I not only think it, I know it. They had the second camp established and men working there before the first camp broke up work.

Q. How were those ties gotten out of the woods after they were made? A. They were hauled out.

Q. Where did they keep the stock? A. At their camps.

Q. What did they keep them in? A. Little lots and stalls. They had lots built of poles and tie slabs and first one thing and another that they could pick up.

Q. About how many men on an average would you say would be employed there on the job hauling and making ties? A. 25 or 30 hands.

Q. Did that include haulers and tie makers, too? A. Yes, sir; probably sometimes more than that, pretty near all the time as many as 25 or 30 hands.

Q. Did they feed the stock anything? A. Yes, sir; the mules and horses.

Q. Did they have any place to keep the feed? A.

Yes, sir; they had a little tie slab house; they hauled the feed from the railroads out to the camps.

Q. Now, after the tie camps were no longer operated on the Felder league, were there any other operations, timber operations? A. No, sir; not that I know of; I don't think there was.

Q. Was there any other timber taken from the league? A. I don't think so. There has been no timber taken from the Felder league since the tie timber was cut off of it; that is, off the north end of the Felder league; they are cutting some timber now off the south half of it and have been three or four months.

Q. Those fellows working in the tie business, how many would they make in a day? A. 10 or 15 as an average, some more and some less, working every day all the time. Some tie makers lay off a great deal. They don't all go out in the woods every day; there is more than half of them that will lay around the camp and play poker or something else, and try to win somebody's money.

Q. They were all there engaged in the business of making ties on this land? A. Yes, sir.

Q. 25 or 30 of them on an average? A. Yes, sir; between 15 and 30 men at the camp, sometimes not so many and sometimes more. You know how men work at a tie camp, don't you?

Q. I don't know much about it. A. Sometimes there would not be over three men in the tie camp for over a week; and then there would be 30 or 40 for three or four days; you cannot keep tie makers bunched up making ties, but there would be tie makers there all the time.

Q. How much of this Felder league did they cut ties

from, I mean what portion of the league did they cut ties from during the time they were at work there? A. They cut ties from on the east end of the league plumb back to the river with the exception of a little corner that the river runs around and takes on the southeast end. You must understand that the east end of the Felder butts against the river. Part of the tie timber comes against the river from the railroad back.

Q. From the railroad back to the river is where they cut the ties? A. Yes, sir; and then on the west side of the railroad there is quite a strip, and the tie timber is cut all over it.

Q. It took these men six years to cut the ties on it? A. They did not cut all the time on the Felder; some of the men cut on the Vanminter also.

Q. Are you positive that this gang of tie makers were cutting on the Vanminter and the Felder and had their camps for six years there on the Felder survey? A. Yes, sir; from the beginning of the tie making to the end of it.

Q. Where on the Felder league? A. The first camp was right east of the sand pit, and the other was over east of Massey's Lake, on the east end of the Felder.

Q. Have you been talking to anybody about your testimony since you were on the stand yesterday? A. No, sir.

Q. Have you talked to Mr. Elias Ward? A. No, sir; not at all.

Q. To nobody else? A. No, sir.

Q. When was it that you told the Houston Oil Company's representatives that you would make them a witness

to the facts you testified to on direct examination. A. Yesterday.

Q. When was it you told the representatives of the Houston Oil Company that you would make them a witness to the facts about which you have testified? A. I never told any member of the Houston Oil Company that I would make them a witness or knew anything about being a witness for them until Sunday morning.

Q. They never talked to you at all? A. No, sir.

Q. When you were summoned down here to be a witness you did not talk to any of them? A. No, sir.

Q. In other words, you never talked to anybody about your testimony until you were put on the stand yesterday morning? A. No, sir; I never did.

Q. They did not ask you what you would swear? A. No, sir; they never asked me what I would swear or anything about it.

Q. They did not discuss with you what you had sworn before? A. No, sir.

Q. Yesterday you spoke about a pumping plant and tank and pump house and a man living in it at Fletcher; that belongs to the railroad company? A. Yes, sir; I think it does; of course, it belongs to the railroad company.

Q. It is right by the side of the railroad? A. Yes, sir; it is on the right-of-way, and the man that lives there is just off the right-of-way.

Q. He is in the employ of the railroad company? A. Yes, sir; and the sand pit company, too; it is his business to run the pump and the sand pit.

Q. You spoke of this camp of tie makers living there on the Felder right near the railroad and close to the pump-

ing station for four years, and then you stated they moved east of Massey's Lake? A. Yes, sir.

Q. And put a camp there? A. Yes, sir.

Q. Did they put up their camp right on the edge of Massey's Lake? A. No, sir; they put it up on what is called the island out in the piney woods.

Q. Northeast of the lake, isn't it? A. Yes, sir; nearly due east of the lake.

Q. How big is that lake? A. A mile and a half long and 60 or 70 yards wide, I suppose.

Q. It runs in what direction? A. A little northwest and southeast.

Q. What portion of the lake was the camp? A. About east of the middle portion of the lake; I did not say it was on the lake at all.

Q. What I mean is, was the camp nearer the north terminus or the south terminus of the lake? A. It was a little south of east of the southeast end of the lake.

Q. How close to the southeast end of the lake? A. I suppose three-quarters of a mile.

Q. I understand you to say awhile ago that it was due east of Massey Lake? A. Yes, sir; about due east, maybe a little south of east; I never taken a compass and run a line there and measured it; I suppose about due east of the southeast end of the lake.

Q. You say that this gang of tie makers averaging 25 or 30 tie makers stayed there two years? A. I didn't say that did I?

Q. I understood you to say that on direct examination A. Did I say 25 or 30 all the time?

Q. I understood you to say that, did you or not? A.

I don't think I did. I said sometimes as many as 25 or 30 in the camp.

Q. Did you say on direct examination that there was an average of 25 or 30? A. I don't think I did.

Q. How is that now, what was the average? A. I suppose about 15 all the time.

Q. It would average about 15 tie makers all the time? A. Yes sir.

Q. Now, name some of the tie makers? A. I don't know that I could; they were a gang of Slavonians or foreign men of some kind that I did not know anything about.

Q. Where are they now? A. I don't know where they are; they were making ties there.

Q. Who had them in charge? A. Well, I think Mr. Fortenberry and Mr. Charles Parker.

Q. Where is Parker? A. I don't know where he is.

Q. Where is Fortenberry? A. He is dead. I never knew any of the tie makers; I saw them there at work; a lot of foreigners.

Q. Is it not a fact that they were not on the Felder league exceeding three months making ties? A. No, sir; I don't think that is a fact.

Q. You swear that is not a fact? A. I don't think it is a fact that they were not there longer than that.

Q. They were there longer than that? A. Yes, sir.

Q. How much longer? A. I don't know how much longer.

Q. You don't know? A. No, sir; something like two years in there making ties.

Q. You are just as positive of that as anything else you have sworn to? A. Yes, sir; I believe I am.

Q. You know it is wrong not to state the truth on the witness stand, don't you? A. Yes, sir; of course, I know. it is wrong not state the truth.

Q. Now, then, you are positive you are stating the truth about the length of time those tie makers were on the land? A. Yes, sir; to the best of my judgment, somewhere in the neighborhood of two years.

Q. Altogether? A. Yes, sir.

Q. Now, what I am asking you is this: I want to know positively from you how long those tie makers from the time they first went on there and stuck an axe in that timber were on the Charles A. Felder league of land until they left there; now be careful and give me a correct answer to that question? A. I positively don't know just how long from the beginning to the end they were on the Felder.

Q. Give us your best recollection on that subject? A. I think the tie making on the Felder from the first to the last was five or six years.

Q. You mean they were cutting ties off and on on the Felder for five or six years? A. Tie makers had camps on it all the time and working there all the time between five and six years; that is my best knowledge about it.

Q. That has not been very long ago? A. Yes, sir; some time ago.

Q. You are not quite positive of that, are you? A. Yes, sir; I think it was between five and six years—might possibly be mistaken, but that is my recollection about it.

Q. They didn't cut any timber on the Vanminter, did they? A. Yes, sir; they cut from the Vanminter.

Q. Don't you know that the Vanminter was claimed by a citizen of Hardin County, and he did not permit any

timber to be cut on there? A. They bought the tie timber from the owner of the Vanminter.

Q. This same camp? A. Yes, sir.

Q. How much of the time were they cutting on the Vanminter? A. Some of the hands cut on it pretty near all the time.

Q. Well, did the gang split up or go from one tract to the other? A. No, sir; but they had different places to work. All the hands don't work right at one spot. Tie makers scatter out and the different men take their territory and go to the same camp and camp.

Q. Did they cut on any other land up there? A. I think on the league adjoining the Felder.

Q. They did not cut much off of that? A. Yes, sir; a good deal of oak ties off of it; I don't know whether they made any pine ties or not; I don't think they did.

Q. That is the Montgomery league? A. Yes, sir.

Q. Not very many oak trees on the Montgomery? A. Yes, sir; right smart.

Q. Covering how many acres? A. Four or five or three or four hundred.

Q. You swear they cut over that many acres? A. No, sir; I would not swear they cut over any number of trees, but they cut oak ties on the Montgomery.

Q. What did they do with those ties? A. Hauled them to the Santa Fe railroad.

Q. Loaded them on the Santa Fe in cars? A. Yes, sir.

Q. The Santa Fe hauled those ties away and kept records of each car? A. I suppose, of course they hauled

them away; they did not stack them up and let them stay there and rot.

Q. You know that the Santa Fe kept records of each car put in there? A. No, sir; I don't know anything about what the Santa Fe done; I don't know a thing in the world about what the Santa Fe done about their records. I never saw none of their records at all.

Q. How long was it after they quit cutting the timber and moved away from there before the Santa Fe hauled all those ties away? A. They hauled them away pretty soon. It is not customary for ties to remain along the right-of-way three or four months. I guess they took them away every month. When they are taken up they are carried off.

Q. Do you man to say that the Santa Fe hauled ties away from there for four or five years? A. Yes, sir; they taken them away all the time.

Q. The ties that were cut and hauled by this camp on the Felder? A. Yes, sir.

Q. How many ties can you make out of the average timber; what is the average? A. There is a difference in tie makers and I don't know that you could make an average. Some tie makers make more than others. Some tie makers are stout, heavy men and can make a good many ties.

Q. You don't understand what I mean. What I want to know is how many ties you could make out of a tree? A. Why didn't you say that? You said what was the average of tie makers, and that is a horse of another color, a tie maker and a tie tree are two different things, I think. It is owing to the size of the tree they work, the length of the tree and the size of the tie they are making.

Q. I speak about tie trees on this land? A. Tie trees average about five ties to the tree, sometimes they get a tree that will make as many as ten or twelve, and whether you are making moon or half moon ties. If the tree is big enough they work it as far as it will make moon or half moon and then make pole ties out of it.

Q. This timber on this land you think would average five or six ties to the tree? A. Yes, sir; about five ties.

Q. The stumps of those trees are still there? A. No, sir; you could not find half of the stumps; they are rotted down, burned up and gone; I don't suppose you could find a third of the stumps.

Q. Could you tell the jury about the number of acres from which they cut the tie timber on the Felder? A. No, sir; I could not tell you exactly the number of acres they cut.

Q. I don't mean exactly, just approximate it? A. I suppose 1,700 or 1,800 acres.

Q. They have cut the tie timber off that much? A. Yes, sir.

Q. That was nearly all east of the railroad in towards the river? A. Yes, sir; nearly all, I suppose a couple of hundred acres on the west side of the track.

Q. This tie camp was on the old Chesher place, the first camp before they moved to the east end of the league?

A. Yes, sir; about the old Chesher place.

Q. How close to the ferry? A. I suppose a quarter of a mile.

Q. Which direction? A. Well, I don't know just exactly what direction it is. I never set a compass on it. I suppose a little northwest or a little west of north. I do not

know exactly the course, and I may be mistaken in that course.

Q. A little northwest of the ferry is where they camped first? A. Yes, sir; a little west of north; I don't know just exactly, but it is about the same angle from the ferry that the K. C. road runs. I don't know the direction that the road runs exactly; I never set a compass on it, and I don't know.

Q. You know the location of the Browning or Chesher place? A. Yes, sir.

Q. They camped there around that old Chesher or Browning lot, right close there? A. Yes, sir.

Q. Right around it? A. Yes, sir.

Q. I will ask you if it is not a fact that just north of Village Creek where the railroad crosses the creek, there is a big sand hill? A. Yes, sir; there is.

Q. That is right against the railroad track? A. Yes, sir.

Q. And they made a side track there for the cars to run off on, the railroad company did, and these people that went there and took the sand got there right against the railroad track there in that big sand hill on this land? A. Yes, sir.

Q. And hauled it in wheelbarrows up on this side track and loaded it in the cars? A. Yes, sir; for quite a time they did not use wheelbarrows, but used shovels, and as they would load it they would push the track into the sand and shovel it in until they got so far with it, and then it made a curve in the switch and the railroad company objected to it, and then they had to roll it up staging plank.

Q. They took it out as fast as they could sell the sand?

A. Yes, sir; there seemed to be a good demand for it. They loaded it out and had men working there all the time.

Q. There was a good big portion of that hill against the railroad track that was dug out and loaded on the cars and moved away in that manner? A. Yes, sir.

Q. And the man that was in charge of that was a fellow living there in that house right near the railroad right of way and looking after the pumping station of the railroad company? A. Yes, sir; his wife run the pump pretty near all the time and he attended to the sand business.

RE-DIRECT EXAMINATION.

Q. This house there in which the sand operator lived is not on the right of way, is it? A. No, sir; it is about twenty or thirty steps away.

Q. I will get you to state as to the condition of that sand pit. You stated yesterday that there was a side track on which the railroad company placed its cars for the purpose of receiving the sand? A. Yes, sir.

Q. I will ask you whether or not there is more than one track there? A. Yes, sir; there is a sand track there.

Q. Where does that sand track lead from? A. From the side track and extends back into the sand pit now.

Q. The railroad put its tracks in there for the purpose of switching its cars on for the purpose of receiving sand? A. Yes, sir.

Q. I will ask you to state what is now the length of the sand track? A. I think it is about 250 feet long.

Q. The sand track? A. Yes, sir; the double track.

Q. What is the length of what you call the side track?

A. It is about 400 feet, I don't know exactly the length of it; it will hold 10 or 15 cars.

Q. How far from the right of way does the sand track extend out into the hill there? A. Well, about 250 or 300 feet.

Q. You say the sand track had not been put in until the side track had been pushed clear outside of the right of way, so far that the railroad company objected to it going in there, and that was on account of the curve? A. They go down hill there and it makes a short curve there, and they objected to the track being moved any further, and they had to put in a sand track to get the sand.

Q. How long will you say from your best recollection that the side track or the sand track has been extended beyond the right of way of the company? A. To the best of my recollection, it has been about 10 or 12 years.

Q. At the time it left the right of way? A. Yes, sir; the side track and the sand track have both been outside of the right of way about that length of time.

Q. At first you said they loaded the sand on the cars with shovels? A. Yes, sir.

Q. And afterwards with wheelbarrows? A. Yes, sir.

Q. And afterwards how? A. Well, they rigged up a little track and they used a horse to pull the sand car, and the little track extended to the other track and level with the floor of the car, and they run the car back into the hills and loaded it with shovels and pulled the car back with a mule or a horse.

Q. They afterwards put in a steam shovel there? A. Yes, sir.

Q. How is that operated? A. It is operated by a gasoline engine.

Q. There on the ground? A. Yes, sir.

Q. Where is that gasoline engine situated, on the right

of way or off? A. Off the right of way on the side of the sand track.

Q. How long did they continue to load with wheelbarrows before they put in the sand shovel? A. Well, they loaded with wheelbarrows several years; I could not tell you exactly how long, six or seven or eight years before they ever put in any other kind of track there, I don't know how long it was, a long time.

Q. Could you give us approximately the dimensions of that excavation made there during those years in taking out that sand, the size of it, including the whole thing, its length and breadth? A. Well, I don't know whether I could or not. The pit now extends back from the switch about 200 or 250 feet, and it is, I suppose, about 18 or 20 feet deep, maybe not so deep, some places 18 and some places 20 and probably 100 feet wide, and this pit where they taken the sand out on the side and loaded with shovels and with wheelbarrows I suppose is about 75 or 80 yards long and I suppose 20 or maybe 25 yards wide.

Q. I hardly think you understand my question. I wanted to ask you to give approximately—I don't want your opinion or guess, but your approximation of it, the dimensions of that area that the sand operation has covered, the entire thing, whether with the wheelbarrows or steam shovel, what area has been covered? A. You mean how many acres would be in the whole thing?

Q. Yes, sir; or the dimensions, you can give it in yards if you want to, stating how long and how wide and how deep the excavation is, describing it in your own way if you have any approximate judgment about it.

Q. What I want to get at is to get you to state in your

own plain way the area of that excavation there, how much is covered, taking it in length and width and everything? A. Well, I suppose there is about two acres of ground, that is, there would be about two acres of ground that is now in the sand pit. The sand has been taken off on about two acres if thrown in a square.

Q. You are approximating that? A. Yes, sir; about that.

Q. I will ask your judgment as to what portion of that two acres would be on the right of way, and what portion off the right of way? A. None of it is on the right of way at all.

Q. None of that includes the right of way? A. No, sir.

Q. In speaking about this tie camp about which Mr. Gordon asked you down near Massey Lake, which you say is southeast of the lake, and about how far from the lake? A. I think about three-quarters of a mile and maybe a little further.

Q. Now, in what direction is it? A. I never put the compass on it; I think it is pretty near east, maybe a little south of east, very little.

Q. You have lived in that country all your life? A. Yes, sir.

Q. You know the boundaries of the league? A. Yes, sir.

Q. Was this tie camp on the Felder league? A. Yes, sir; on the Felder league.

Q. I will ask you who has had the inspection and loading of the company's cars at the sand pit? A. Well, some-

times the section hands loaded the cars; they would put the cars in. The Santa Fe objected to the sand pit.

Q. I never asked you that. Listen to the question and don't go outside of it. You say that the Santa Fe put cars in there and received cars there? A. Yes, sir.

Q. Who inspected that sand, who took up the sand? A. The men working there in the sand pit took up the sand and loaded it in the cars. I don't know whose supervision the Santa Fe Company's sand was loaded out under. I know the section hands loaded sand for them out of the pit, but this Texas Supply Company had sand loaded out of the pit and shipped out.

Q. That is what I asked you about, I did not ask you about the men that actually operated the railroad company's cars, and put them at the proper place. I asked you who took the sand; did the operatives of the Texas Supply Company take it out or who? A. I don't know who taken it out; I don't know who had the management of it. I know there were men there running the work, but I don't know who.

Q. Do you know who those men were paid by? A. No, sir; I don't know who paid them. I know they were running the pit and that is all I do know.

Q. Did you ever see Mr. Fortenberry down there? A. Yes, sir; I seen him there.

Q. Whom was he representing there? A. Railroad Company, the Pine Land Company.

Q. The Pine Land Company is not the railroad company? A. He was representing the Pine Land Association.

Q. Was he down there in regard to the sand?

The Witness: I don't know whether he was there looking after the sand or not. I never heard him say so and never heard anybody else say so.

Q. With whom did he confer and with whom did he talk when he came down where the operatives were? A. He generally talked with the hands working there.

Q. What were the hands doing? A. Loading sand.

Q. When did he first commence coming down there, about what year was that? A. I positively don't know the year; I could not tell you to save my life what year he first commenced coming down there.

Q. I will ask you to state whether or not it was near the beginning of the operations or later? A. It was somewhere near the beginning; the sand pit had been running a while when he first commenced coming down there; I don't remember how long; it might not have been but a short while; I could not tell you just how long it really was.

Q. Did the gentleman who first occupied this house, not the little pump house where the railroad tank is, but the house we speak of being away from the right of way, was he a man of family? A. Yes, sir.

Q. He was a man of family? A. Yes, sir.

Q. How many years did you say he lived there? A. I think he stayed there three years, but I am not sure.

Q. The first man? A. Yes, sir; I think he was there three years.

Q. Did you ever have any conversation with this man as to how he was living there, and under whose permission he was occupying the premises? A. No, sir.

Q. You did not? A. No, sir.

Q. He was operating the sand pit? A. Yes, sir; and running the pump.

Q. What year did you say it was that he took possession of the house? A. I disremember just what year it was.

Q. How long was it after the railroad came through there on the Felder league? A. It was two or three years after the railroad had crossed the creek.

Q. Before the house was built? A. Yes, sir; before the house was built.

Q. Now, when this first man that occupied the house moved out did anybody else move in? A. Yes, sir.

The Court: Has not that been gone over?

Yes, sir; I believe it has.

Q. For whom was the Massey Lake named that you mentioned awhile ago? A. I think for a man named Massey.

Q. What Massey was that? A. Asa Massey, I think they called him; he settled on the league there. I never saw Massey and don't know anything about him; it has always been called the old Massey field and the lake the Massey Lake.

Q. I will ask you at the time of the operation of this sand pit and tie yards and things of that kind were going on during the time and at the time they were commenced, who made claim to the Felder league, that land?

Judge Kennerly: We are reading to the bottom of p. 333. We also read from the record on p. 461, and offer in evidence the lease from Asa Massey to Thos. J. Word, dated November 27, 1854. I offer the original instead of the copy from the record.

"The State of Texas,
Tyler County.

I this day leased of John Smith and Thomas J. Word 320 acres of land on the league of land on which I now reside, including the improvements I have made on said land, and being also the headright league granted to D. C. Montgomery on or about the 29th day of August, 1835, and the headright league granted to C. A. Felder for the term of five years from this date, at the end of which time I hereby agree and promise to surrender possession of said league of land to the said Smith and Word, or their heirs or their assigns, the said lease being free and in consideration of improvements I have made on said land.

Witness my hand and seal this 27th day of November, 1854. (Seal)

R. K. RATCLIFF.

—MARKLEY.

ASA MASSEY "

JOHN S. DOUGHTIE, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Where do you live? A. In Nacogdoches.

Q. How long have you lived there? A. 30 years.

Q. Where were you raised? A. In Alabama.

Q. How long have you been in Texas? A. 37 years.

Q. Where did you live in Texas before you went to Nacogdoches? A. San Augustine.

Q. There has been offered in evidence in this case what is claimed to be a deed from Chas. A. Felder to John A. Veatch. On that purported deed appear the names of W. B.

Barnett and Samuel Palmer claimed to be signed as witnesses. I will ask you if you have made an investigation of any records to see if you could find the names of those persons?

A. Yes, sir.

Q. What records have you examined? A. Nacogdoches County, Texas.

Q. When did you make that examination? A. Yesterday evening.

Q. How far back did you go? A. I went back in the archives in Book 1, Book a, Booka, Book 4, Book 5 and Book 6 from 23 to 90.

Q. What else did you examine besides the archives? A. The probate records and marriage records.

Q. Did you examine any deed records? A. Yes, sir.

Q. Besides the archives you examined the deed records? A. Yes, sir.

Q. Did you examine any records in the District Clerk's office? A. No, sir; I did not go in the District Clerk's office.

Q. Did you find the names of those two men at all on those records? A. No, sir.

Q. State whether or not your examination was thorough or otherwise? A. Yes, sir; I went through it myself and had two other men go through it with me.

Q. Did you personally see everything there was? A. Yes, sir.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. What time yesterday evening did you commence?

A. Three o'clock.

Q. What time did you quit? A. Half past five.

Q. Two hours and a half? A. Yes, sir.

Q. You examined how many pages? A. I just went through the direct and reverse indices.

Q. The older archives are in Spanish? A. Some of them have been translated.

Q. How many pages would those volumes cover? A. I would say Book 1 would cover a thousand pages, and Book 2 is not so large.

Q. Book 2 is not so large? A. No, sir, I don't think it has over five hundred pages.

Q. How is No. 3? A. About like No. 1.

Q. That would be 2500 pages? A. Yes, sir.

Q. Are No. 4 and No. 5 about like No. 1? A. Yes, sir.

Q. That would make 4500 pages? A. Yes, sir.

Q. On those pages appear the names of various and sundry people? A. Yes, sir.

Q. Now the direct index would show the name of the grantor and the reverse index the name of the grantee? A. Yes, sir.

Q. As far as the names of other parties as witnesses, officers and notaries is concerned, it would not appear from the index would it? A. I looked through the index.

Q. Answer the question, it would not appear would it? A. Yes, sir, it would appear on the record.

Q. You did not look through the records? A. I went through the indexes for B and P, Barnett and Palmer.

Q. What Barnett? A. W. B.

Q. What Palmer? A. Samuel Palmer.

Q. You know as a matter of fact that there was a well known Palmer family living in Jasper County during the early days? A. I don't know anything about Jasper Co.

Q. Don't you know that Martin Palmer of Jasper Co. signed his name to the Texas Declaration of Independence, as delegate from Jasper Co.? A. No, sir, the only man I remember signing it was S. W. Bloant of San Augustine Co. I remember seeing those signers.

Q. Martin Palmer was the delegate from the Municipality of Bevil (or, Beve) to the convention that declared the independence of Texas from Mexico and signed that declaration? A. I don't know that. I have seen the names of those people, but I don't remember them all.

Q. Do you remember that name? A. No, sir, I do not.

Q. At any rate you looked through the records in two hours and a half; you inspected the direct and reverse indices? A. Yes, sir.

Q. You did not find the names of the two men in Nacogdoches County? A. No, sir.

Q. What other records did you examine? A. Well, I examined the old archives.

Q. Which ones? A. The oldest ones, from 23 to 50 I think; I just examined for the Bs and Ps, Barnetts and Palmers.

Q. To see if they had ever sold land or received land? A. Yes, sir.

Q. You did not find where they had sold land or had land in that County as far as the indices showed? A. No, sir.

Q. That is the extent of your examination? A. Yes, sir.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. You did examine the indexes? A. Yes, sir.

Q. That is what you were asked to do? A. Yes, sir.

Q. You examined the index to the probate records? A. Yes, sir.

Q. That would give the names of estates administered on in that County? A. Yes, sir.

Q. If a man died and left an estate and it was administered on, you would catch it in that index? A. Yes, sir.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. There are a great many people living in that county whose names do not appear on the direct or reverse index? A. Yes, sir.

Q. And have been since you have been acquainted with the people of the country? A. Yes, sir.

Q. A great many people do not buy and sell land and their names do not appear on the direct and reverse index? A. Yes, sir.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. It would be rather unusual for a man to live in that county or any other county in Texas and not get his name on the marriage records or the marks and brands records, the deed records or some of the probate records of the county?

Mr. Gordon: We object to that.

Objection sustained.

Defendants except.

Judge Kennerly: We now offer the evidence of Elias Ward from p. 340 of the printed record.

Mr. Gordon: We have an agreement to use the testimony

of witnesses from the record, but that of course contemplated the absence of the witness. Where the witness is present in court, we submit that the testimony should not be read. This witness is here today under subpoena by these gentlemen.

Judge Kennerly: The agreement contemplates saving time and we offer it for that reason.

The Court: That depends on the terms of the agreement.

(Agreement offered to the court for inspection).

Objection overruled.

Plaintiffs and interveners except.

Judge Kennerly: We have another witness, Judge Watts, that we want to put on and then we will read the testimony of this witness, and also explanatory of our reasons for reading from the record, that the plaintiffs and interveners read Mr. Danzinger's testimony from the record when he was personally present in court.

The Court: I will permit you to read from the record, because in the opinion of the court the agreement is not ambiguous.

JUDGE A. T. WATTS, a witness for the defendants testified as follows:

Questioned by Judge Kennerly:

Q. What is your calling or profession? A. Lawyer.

Q. How long have you practiced law? A. Fifty years.

Q. Did you ever hold any official position in Texas?

A. Yes, sir, several of them.

Q. What were those positions? A. Well, I was

representative from this District in the Legislature, and I was on the Commission of Appeals of the State of Texas and I was State District Judge here.

Q. You have lived in Beaumont quite awhile? A. Yes, sir, since 1901.

Q. Where did you live before that time? A. I lived before that time in Dallas and Weatherford and prior to that time I lived at Livingston for many years.

Q. Are you familiar with what is known as the Menard records, the old judicial county of Menard? A. Yes, sir.

Q. Have you in your practice as a lawyer had occasion to examine those records? A. Yes, sir.

Q. How often? A. Several times. I think as early as 1859 I examined those records in Woodville.

Q. Where were they then? A. In Woodville, Tyler County.

Q. Where have they been since then as far as your knowledge goes? A. In Woodville, Tyler County.

Q. In whose custody? A. The Clerk of the County Court of Tyler County.

Q. Have you known of them being elsewhere? A. No, sir, I have never seen them elsewhere.

Q. You referred to one occasion in 1859 that you examined the records; have you had occasion to examine them since then? A. I have examined them two or three times since I came to Beaumont.

Q. Did you ever hear of their being in the office of the County Clerk of Liberty County? A. No, sir, I never heard of their being there; in fact I lived in Liberty County in 1871, 1872 and 1873, and there were no such records there at that time.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. In whose handwriting are those records? A. I have no idea in the world. There are two books there that are called the Menard Records, and they have got the old deed records and accounts all mixed together in the books.

Q. Store accounts and saloon accounts and things like that? A. Yes, sir.

Q. And the deed records all mixed up together? A. Yes, sir.

Q. That is the way the books are made up? A. Yes, sir, deed records, store accounts, merchandise account and saloon accounts and a general conglomeration.

Q. And they contain bills of sale of negroes? A. Yes, sir, I believe a few bills of sale of negroes.

Q. And some reports of elections that had taken place?
A. I don't remember that.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. Still those records were there in the custody of the county Clerk? A. Yes, sir.

Q. Do you know whether in those bills there is any charge against Sam Houston? A. I don't recollect.

Judge Kennerly: We will insist on this record now that we started to read, p. 340, the testimony of Elias K. Ward:

E. K. WARD, a witness for the defendants, testified as follows:

Q. Mr. Ward, where do you live? A. I live in Hardin County.

Q. How long have you lived there? A. I was born and raised there; I live near Silsbee, that is my postoffice, one mile from Silsbee.

Q. How old are you Mr. Ward? A. 56 years old.

Q. Do you know where the Charles A. Felder league of land is located in Hardin County? A. Yes, sir.

Q. How long have you been acquainted with the location of that league? A. Since I can recollect; I was raised on it.

Q. You were raised on it? A. Yes, sir, and worked on it since I was a boy.

Mr. Lee: We omit from and including the seventh question and answer down to p. 349, beginning then with the last question on that page:

Q. In what respect was Mr. Fortenberry working for or representing the Texas Pine Land Association?

Q. Who was Mr. Fortenberry representing at the time?
A. The Texas Pine Land Association.

Q. In what respect, what was he doing for them? A. He was getting out ties and piling for them off the Charles Felder league at that place; that was his part of the work.

Q. How long did he continue in that capacity under the Texas Pine Land Association? A. Until Kirby Lumber Company bought them out, I don't know how long that was.

Q. Your best recollection is, how long? A. I think in 1891 and 1892 he was down there at work; that is my recollection; I was working with him there at Fletcher.

Q. If you were there working with him, could you say how many years he carried on the work? A. Until the Kirby Lumber Company bought the Texas Pine Land Association out.

Q. Do you mean the Kirby Lumber Company or the Houston Oil Company? A. I mean the Kirby Lumber Company or whatever it was, I thought it was the Kirby Lumber Company at that time, and the Houston Oil Company bought the Kirby Lumber Company's timber, part of it.

Q. The matters about when the property changed hands can be more definitely fixed, but I would like for you to state the length of time Mr. Fortenberry operated there? A. Well, it was several years, but I don't remember how many years that he was working there. Mr. S. M. McNeeley was one of the managers, but he looked after the saw-log department at that time.

Q. Could you state about when it was that Mr. Fortenberry commenced looking after the ties under the Texas Pine Land Association? A. It was in 1891 or 1892, '91 is my recollection; we commenced at Fletcher and made ties up to Silsbee which is about five miles by the line; the ties we hauled and put on the track and the piling for making trestles; I was working there with Mr. Fortenberry; we worked there and up to Silsbee, I don't remember how long it was, and then we put in wood there; we had a wood yard at both places, one at the sand pit, and one between there and Silsbee and one at Silsbee; they burned pine knots in the engines; he was still working at it as long as we stayed there.

Q. Did I understand you to say that you put wood off the Felder league at Fletcher? A. Yes, sir, we had a wood yard there.

Q. How long was that wood yard in operation? A. About a year I reckon.

Q. Where did you get that timber from? A. Off the

Felder and Montgomery, and we had a yard on the Bradley right above there, and one on the Ellis.

Q. The wood yard at Fletcher operated a year? A. Yes, sir, longer than that. They would take water there and wood up there, they stayed there a couple of years I reckon.

Q. You mean wood taken from the Felder and hauled out on the right-of-way? A. Yes, sir.

Q. Who hauled it? A. Fortenberry and I.

Q. For whom were you working? A. Frank Aldrich, Superintendent of the G. B. & K. C. Company.

Q. Whose timber were you taking, who was claiming the timber? A. The Texas Pine Land Association.

Q. Do you know anything about the sand pit up there at this station called Fletcher? A. Yes, sir.

Q. What league of land is that on? A. On the Charles A. Felder league in Hardin County.

Q. I will ask you when the operation of that sand pit first commenced? A. When the road got across there, whatever year that was, '91 I reckon. It commenced just as quick as the road got across there, across Village Creek on the east side. The first sand I remember being hauled from there was to put down the boiler work; that was the first sand coming that way; it went to the mill to put down the boiler, but the sand came back this way when the road was built, right at the start when they got through there.

Q. You don't know exactly when the road got there? A. It crossed there in '91 is my recollection.

Q. The sand pit commenced as soon as the railroad got across there? A. Yes, sir, I helped load sand in the cars and put it across on this side of the abutments of the trestle; threw the sand on a push car when they came across.

Q. Who was claiming the land there where the sand pit was located at the time? A. The Texas Pine Land Association.

Q. Do you know what the arrangement was with the railroad company, who loaded the cars? A. No, sir.

Q. Was it loaded on cars at the sand pit? A. Yes, sir. Aldridge is the man that had it loaded.

Q. What was done with the cars when they were loaded? A. They were pulled back this way and unloaded at wet, boggy places.

Q. When they were brought there to be loaded, what was done with the empty cars? A. They were brought there and a crew would load the cars.

Q. Where was the crew? A. On the work train.

Q. Did that arrangement keep up all the time, or was there a change in that operation? A. I don't know how they arranged it after that.

Q. How did they load the cars, by what means? A. With shovels.

Q. Steam shovels or not? A. Hand shovels until they got the steam shovel in there.

Q. Commence in the beginning with the loading of the sand and state how it was done? A. It was loaded with shovels.

Q. At that time the crew would come right in there and the crew on the cars would load them? A. Yes, sir, and afterwards they got to hauling the sand by wheelbarrows and moving it to the cars.

Q. At that time, did the operatives on the train load the cars? A. Yes, sir, they would load it in box cars for shipping.

Q. Who loaded the cars? A. The G. B. & K. C. at that time loaded it.

Q. Do you know what the railroad company paid for the sand? A. No, sir, I don't.

Q. You don't know? A. No, sir.

Q. Do you know whether or not they paid anybody to load the sand? A. They paid the men that loaded all of it. After they got to loading it in box cars they paid for it by the load possibly.

Q. Do you remember a house somewhere near the sand pit in which persons lived that had the sand pit in charge there? A. Yes, sir, I know the house that is there.

Q. When was that house put there? A. It was put there about the time the sand pit was commenced to be worked; when they commenced to sell the sand and load the cars; I don't remember just when, what year; after they commenced to load the sand on for Silsbee.

Q. The railroad company had a tank there? A. Yes, sir, they had a tank there, that is the railroad company.

Q. They had a tank house? A. Yes, sir, it was down the hill on the right of way.

Q. I am speaking about the house, not on the right of way, and we will designate it as the house where the sand-pit man lived? A. Yes, sir, there was a house that the men lived in.

Q. I don't care who actually built the house, but who had it put there? A. Frank Aldridge and W. W. Fortenberry.

Q. Fortenberry represented the Texas Pine Land Association? A. Yes, sir.

Q. Was that house on the right of way or off the right

of way? A. It was off the right of way. The sand shovel finally got to the house, and they had to move it back. There were two houses there at that time; they built two, one for white men and one for negroes.

Q. From the time that house was put there and commenced to be occupied, state whether or not it has been continuously occupied since that time or not?

The Court: Ask the question how long the house was occupied.

Q. Go ahead, you heard the question. (Question read to the witness.)

Q. Have you been able to understand the question? (Question read again.) A. It has; it has been occupied all the time; there has been someone living in it.

Q. I will ask you whether or not the operation of the sand pit has continued from the time it commenced, or whether there has been a break in the operation of the sand pit? A. I don't know; there might have been times it was not run.

Q. How often have you been to the sand pit? A. I go there every once in a while now.

Q. Do you go there as often as you used to? A. No, sir, I used to live there.

Q. When you were frequently there state whether or not it was in operation while you were there? A. It has never been abandoned or vacated while I was there.

Q. I will ask you how far the tracks extend out from the railroad right of way into the Felder league there?

Q. Are there any tracks or is there a track extending out from the railroad company track proper, out beyond the

right of way of the railroad company there at the sand pit?

A. Well, I suppose there is.

Q. If you don't know I will not ask you about it. A. I know it does.

Q. I will ask you what distance those tracks extend out in there? A. 75 or 100 yards; I don't know exactly; that is just a guess.

Q. I don't want you to guess; I thought maybe you could approximate it; give your best judgment? A. I could not tell exactly, 75 or 80 yards.

Q. Do you know how many tracks were there, how many switches running out in the sand pit? A. No, sir, I don't know.

Q. You had nothing to do with the sand pit? A. No, sir, not a thing.

Q. Could you give us approximately the area there from which the sand has been taken? A. Well, it is a good big place; it must be an acre or over an acre dug out in a round shape that way; it goes out in a circle; I expect an acre or an acre and a half.

Q. You are just surmising about that? A. Yes, sir; I could not tell exactly what it was.

Q. I will ask you whether or not subsequent to the time the railroad came through there any portion of the land was occupied in the way of cutting timber? A. Yes, sir.

Q. Was any tie business carried on there? A. Yes, sir; there were tie camps there.

Q. Where was the first tie camp put there after the railroad came in, how far from the station of Fletcher? A. About a half or three-quarters of a mile.

Q. What direction? A. North; up on the north

boundary of the league, but east from Fletcher towards the river.

Q. How many people were in that camp on an average making ties? A. Five or six; half-dozen tie makers at least in the first camp up there.

Q. A half-dozen at least? A. Yes, sir; I hauled ties there, but I forgot how many there were I hauled ties to the tie yard.

Q. State where the men that were actually cutting ties lived there at the time they were cutting the ties? A. They lived in the camp and stayed there as long as they made ties there.

Q. You were hauling ties? A. Yes, sir; I hauled all the ties they made there; that is, my teams did; mine and Fortenberry's.

Q. Where did you keep your commissary and teams? A. I carried the teams home at night and the commissary was out there.

Q. While the ties were being taken from the land there you say these men lived there in the camps on the land; how long was the first tie camp in operation from the beginning to the end of the first tie camp? A. It stayed there about a year.

Q. The first tie camp? A. Yes, sir.

Q. Was a second tie camp established there on the league? And if so where? A. Later on there was a tie camp established on the east end of the league, and it was occupied by Bohemians; 25 or 30 of them.

Q. When was the camp moved to this place? A. I don't remember when they went to work; what year it was.

I don't remember what year the Bohemians made ties there. I didn't have anything to do with that camp.

Q. What was done with the ties taken from the Felder, what was done with them? A. Put on the G. B. & K. C. road, what I took out of there. I don't know what was done with the others.

Q. They were all put out to be loaded on the railroad company's trains? A. Yes, sir; sold to the railroad and expected to be put on the cars on the track.

Q. Do you know anything about the operation of a concern known as the Kirby Tie Company? A. This Bohemian camp was a Kirby tie camp. Charley Parker was a tie contractor there.

Q. Do you know how they operated the trains in getting the ties away from there? A. Yes, sir; they would bring the tie loaders down and load on what was accepted and then they would fill the yard again, and send down again and load between the passenger trains.

Q. Whose tie trains were they? A. Kirby's tie trains.

Q. What would they do with the ties? A. Haul them to Silsbee and switch them into the switch yards, and then send them somewhere; the Santa Fe bought them, I suppose. The first ties I hauled they put in the track of the G. B. & K. C. as I hauled them.

Q. During the time you were taking up ties from the Felder league, who was superintending that business? A. Frank Aldridge.

Q. The tie part of it? A. Yes, sir.

Q. Who was claiming to own the land? A. The Texas Pine Land Association.

Q. As they would encroach into the sand hill there,

has there been any change or movement of the sand tracks?

A. I have not noticed that lately.

Q. Are the tracks just as long as when they were first built? A. They are further out from the railroad; they are longer than they were; they kept going out all the time.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. That Kirby Lumber Company has a tie department that is auxiliary to the lumber company? A. Yes, sir; I guess so.

Q. Called the Kirby Tie & Lumber Company? A. Yes, sir.

Q. It is a branch of the company's operations? A. Yes, sir.

Q. Is that right? A. Yes, sir.

The Court: If he knows it, he can answer the question.

Q. The Kirby Lumber Company has a tie department? A. Yes, sir.

Q. That is what you are talking about, is it? A. Yes, sir.

Q. It is the Kirby tie department and piling department? A. Yes, sir.

Q. That was organized in 1901, was it not? A. That might be so; it was first the Texas Pine Land Association, and then the Kirby Lumber Company came into existence.

Q. That was in 1901 or 1902? A. Yes, sir.

Q. That is when the Bohemians were on the east end of the Montgomery or Felder league? A. No, sir; they were there after that.

Q. The Texas Pine Land Association made ties first

for the G. B. & K. C. Railroad Company to make the track with. Then John H. Kirby put in a tie camp for the Kirby Lumber Company, and that company had two departments, one a lumber and the other a tie department, and McNeeley is superintendent of the tie department, and those Bohemians were making ties there after the Texas Pine Land Association had sold out; the Kirby Lumber Company was not organized until 1901, was it? A. I don't know about that.

Q. When were they organized, think about it a minute, and you will recollect? A. It was about 1891 that we went to work there, 1891 or 1892.

Q. It was in 1891 when the railroad was built there? A. Yes, sir.

Q. That was John Kirby's road? A. Yes, sir; I suppose so. They commenced working there, I think, in 1891.

Q. You are certain that you hauled all those ties that were cut in 1891 and 1892? A. I think it was 1892.

Q. How long were you hauling there? A. I was not hauling there very long; it did not take long to haul them out.

Q. You did not haul anything like 490,000 ties, did you? A. No, sir; I was hauling ties to build the track with.

Q. Then they made ties on the Felder, Montgomery and Bradley, and as they built the road they would continue to move the tie makers up the road? A. Yes, sir; until they got the road into what is known as the Robertson woods.

Q. Going towards Silsbee? A. Yes, sir; the tie makers moved ahead with the building of the road. They made ties on the Felder for a year or so. The camp stayed there until they worked up the timber on the east side of the railroad; I don't remember how long that camp stayed there, but

a year or so, and maybe a little over that; I don't remember the time.

Q. Then they moved up on the Montgomery? A. The tie makers moved, but the commissary did not move.

Q. After they cut the ties on the Montgomery, they moved the camp on the Ellis then? A. No, sir; they began on the Hunter, I think.

Q. During all this time the railroad was building? A. Yes, sir.

Q. What was the end of the railroad? A. Silsbee.

Q. The railroad had been built several years before the Kirby Lumber Company was organized? A. Yes, sir; several years.

Q. These Bohemians that were cutting the ties later cut for the Kirby Tie Company or the Kirby Lumber Company? A. Yes, sir; they were making ties for the Kirby Lumber Company.

Q. Are you employed by the Kirby Lumber Company? A. No, sir.

Q. Or the Houston Oil Company? A. No, sir; they will not hire me.

Q. You have been, have you not? A. I have worked a day or two for them going with surveyors when they did not know where the lines were and I would show them to them.

Judge Kennerly: We offer the first five questions and answers on p. 342.

Q. Did you ever know an old lady, I don't know whether a widow or not, named Mrs. Elizabeth Browning?

A. Yes, sir; I was well acquainted with her.

Q. Where did she live? A. In the same house Chesher lived in; she lived with him.

Q. There at the place now known as Fletcher? A. Yes, sir.

Judge Kennerly: On p. 343 beginning with the fourth question I read, and omit the last sentence on p. 343. I read the third question from the bottom of p. 343.

Q. I will ask you whether or not a man named Judge Watts ever came down there to interview Mrs. Browning in reference to her possession there and cutting timber? A. Yes, sir; I remember that P. S. Watts came down there while I was working there.

Q. Who did he claim to represent? A. Susan Moore.

Q. Anybody else? A. No, sir; but I think it was land owned by Word and Moore at the start. I think his rights were from Susan Moore; he was employed by Susan Moore.

Judge Kennerly: In connection with the testimony of this witness, we offer the power of attorney from Judge George Moore to P. S. Watts found on pp. 277 and 278 of the printed record in this case, dated May 2, 1878:

"The State of Texas,

County of Travis:

Know all men by these presents, that I have this day nominated, constituted and appointed, and do by these presents nominate, constitute and appoint P. S. Watts, of the County of Hardin, in said State, my true and lawful attorney in fact to take and hold possession of the following tracts and parcels of land belonging to my wife, Susan Moore, to-wit: One league originally granted to Uriah Davidson; one league

granted to Charles A. Felder; one league granted to Denis C. Montgomery; one league granted to T. J. Harrison; one league granted to S. P. Bankston; one league granted to Henry McGill, with the exception of nine hundred and sixty acres out of the northeast corner of the same; and one league granted to Alexander Hamilton, all situated in said Hardin County; and also one league granted to Samuel R. Fisher, situated in Hardin and Tyler Counties; and also one league granted to M. M. S. or Coznova, situated in Hardin and Polk Counties; and I do by these presents authorize my said Attorney to sell and dispose of the timber growing upon said land, upon such terms as he may think to the interest of my said wife, and for me and in my name to demand and receive the rents which may be due, or damages to which myself and wife may be justly entitled from occupants or trespassers upon any of said land; it being understood, however, that no rents are to be demanded from such parties as went into possession and have held possession under title and authority of Col. Thomas J. Word, of Anderson County, or myself and wife, or under transfers of the possession or in right of occupancy derived from parties who went into possession as aforesaid, provided they will now make a written acknowledgement and renewal of occupancy under the title of my said wife, and I do by these presents authorize my said Attorney to make new leases of said parts and parcels of the same as in his judgment may be reasonable and right. And I do by these presents revoke and annul all former authority and agency of any kind and character heretofore

given or conferred upon any person or persons whomsoever to act for and in representation of myself and said wife in any manner whatever touching or concerning the premises herein referred to in any particular whatever, and I do by these presents hereby ratify and confirm any and all things which may be properly done by my said Attorney, under the authority by and herein granted to him, as if I were personally present and consenting to the same.

In testimony whereof, I have hereunto set my hand and affixed my seal using a scroll for seal, this 2nd day of May, A. D. 1878.

GEORGE F. MOORE.
(Seal).

Signed, sealed and delivered in presence of,

Judge Kennerly: We now offer part of the testimony of N. B. Scott.

Mr. Gordon: I want to cross examine your witness Ward.

Mr. Lee: We offer on p. 306 at the middle of the page the testimony of Mr. Ward beginning at and with the second question on that page. (Not offered.)

Judge Kennerly: We now offer the testimony of Mr. Scott.

Mr. Gordon: I want to cross examine Mr. Ward.

Judge Kennerly: We suggest that if they put Mr. Ward on, it will be on cross examination after we finish our case.

Mr. Gordon: I don't make any question about it, go ahead gentlemen.

Judge Kennerly: We begin on p. 401 with the testimony of Mr. Scott.

Mr. Gordon: I want the record to show about that. Stand up Mr. Scott. We make the same objections to this we did to the testimony of Mr. Ward, for the reason that Mr. Scott is here in the Court room under a subpoena by the defendants, and we now tender them their own witness here, and ask them to put him on the stand and not read the former testimony.

The Court: Under the terms of the agreement, I have no power to compel them to put the witness on the stand.

Judge Kennerly: I now read from p. 402. I omit the last three questions on p. 402 and all of 403, 404, 405, 406, 407, 408 and 409, and begin with the last question on p. 410. N. B. SCOTT, a witness for the defendants, testified:

Q. Where do you live? A. In Hardin County, near Silsbee.

Q. How long have you lived in Hardin County? A. Thirty-eight years.

Q. How long did you say you had lived in Hardin County? A. Thirty-eight years, as near as I can remember.

Q. How old are you? A. Turning my fifty-third year.

Q. You were not born in Hardin County? A. No, sir.

Q. Do you know where the Felder league is, how it is located in Hardin County? A. Yes, sir.

Q. How long have you known the location of that league? A. Ever since 1874.

Q. How far have you lived from it during that period of time? A. I have not lived over five or six miles from

it no time; most of the time a mile and a half and sometimes on it.

Q. Do you know the place there on it that was once known as the Chesher ferry? A. Yes, sir.

Q. Is that the place now known as Fletcher? A. Yes, sir.

Q. When did you first see that place? A. In 1874.

Q. How far have you lived from it during that period of time? A. As I have stated, not over five or six miles at any time.

Q. It is on the Charles A. Felder league? A. Yes, sir.

Q. On the east side of the Felder league? A. Yes, sir.

Q. And from that time it remained vacant until when? A. Until the K. C. road got there; I think that was in 1892 or 1893.

Q. You mean the G. B. & K. C. road? A. Yes, sir.

Q. Where were you at the time the railroad built across Village Creek? A. I lived five miles, I think above there.

Q. You think that was '93 that the railroad came up there? A. Yes, sir; I think it was.

Q. Do you know anything about the operation of a sand pit up there? A. Yes, sir.

Q. There at Fletcher? A. Yes, sir. Mr. Fortenberry hauled some lumber there and built a house there for the gentlemen that run the sand pit and he paid for the work there that is what I think about it; that must have been in '84 or '83.

Q. You mean '93 don't you? A. It was in '93 or '94.

Q. Who was Fortenberry representing? A. I knew

he run the business; I passed there and saw him there, and he was their agent, the men that run the pit.

Q. Did he tell you that? A. Yes, sir.

Q. Did Fortenberry tell you that too? A. Yes, sir.

The Witness: Mr. Fortenberry told me.

Q. What kind of a house did Mr. Fortenberry put up there? A. A small board house, box house.

Q. About how many rooms? A. It must have been three rooms.

Q. That was after the railroad came in? A. Yes, sir; shortly afterwards.

Q. It was not put there before? A. No, sir; it was not before.

Q. Was that on the right-of-way or off the right-of-way? A. It was off the right-of-way.

Q. On the Felder league? A. Yes, sir.

Q. Did anybody go in to that house? A. Yes, sir.

Q. Who was the first person that Mr. Fortenberry put in that house? A. Mr. Purley.

Q. Was he a man of family? A. Yes, sir; he was.

Q. How long after the house was built until it became occupied by Mr. Purley? A. I think it was recently, right away after they got the house up.

Q. How frequently were you down there during the time and while the sand was being removed? A. I passed through most every week hunting and going hunting; I was by there very often.

Q. Did you have any stock in the bottom at that time?

A. Yes, sir.

Q. Did you see Mr. Fortenberry there yourself? A. Yes, sir.

Q. State whether or not you ever heard any statement from Purley with reference to who put him in there? A. Yes, sir.

Q. What was it? A. That Mr. Fortenberry put him in there to run that business.

Q. What business? A. The sand work there, load sand.

Q. How long did Mr. Purley remain in that house? A. I think he must have remained there three or four years, to the best of my recollection.

Q. Well, from the time he got there, whatever time that was, I will ask you whether the house was continuously occupied by him or only periodically? A. It was continuously occupied.

Q. What was he doing during the time he was there? A. Loading sand or having it loaded at the sand pit.

Q. Could you describe the situation there with reference to this sand operation, that is, the operation of the sand pit, how it was done at first, and then how it was changed afterwards, and so on, and tell us how the thing developed at different times? A. Yes, sir; I believe I can describe that all right. They started in to load it at the start right close to the track and run the spur on and loaded as they went, excavated and cut a place there; they started close to the track, in the sand.

Q. How did they first load the cars? A. With shovels.

Q. What was the next means they had? A. Well, they used wheel barrows.

Q. Do you know how they have been loading in recent

years? A. No, sir; not right lately; I have not been around there much.

Q. Do you know whether they have been operating a steam shovel with a gasoline engine in the pit? A. I have not been there since they got the gasoline engine.

Q. How far would you say that the sidetracks extend out into the pit? A. I think 150 or maybe 200 yards.

Q. I will ask you to describe, if you can, to the jury or state, in your judgment approximately, what the area is that has been covered by the operations for the sand? A. I think there is over an acre there.

Q. How much over an acre? A. It is a hard matter to make an estimate; I think though it must be an acre and a quarter or something like that.

Q. Have you ever made an estimate of it? A. No, sir.

Q. It may be a good deal more than that? A. Yes, sir; it may be.

Q. Have you ever noticed the depth of the sand pit there? A. I have noticed it.

Q. From what depth to what depth would you say? A. I think 15 or 20 feet in places; 10 or 15 something like that.

Q. Have you ever made an estimate of that? A. No, sir.

Q. Or examined to ascertain anything about that? A. No, sir; I have not.

Q. Just as you rode along or saw it from casual glances? A. Yes, sir; passing by and looking at it.

Q. Now, the loading of that sand, I will ask you to

state whether or not that was kept up continuously or only engaged in at periods.

Q. Answer that question. A. To the best of my judgment it has been kept up continuously. I don't think there has been a great while between the times, most of the time there is work going on there, loading sand.

Q. Mr. Purley you say stayed there three or four years; did anybody go in the house after he moved out? A. Yes, sir.

Q. Who was that? A. Mr. Carroll.

Q. Was he a man of family or not? A. Yes, sir.

Q. How long had Mr. Purley been gone before Mr. Carroll took charge? A. I think he came right in to run the sand pit.

Q. How frequently were you down there during that time? A. Every week or two.

Q. Did you see the place vacant at any time? A. No, sir; I never saw the place vacant; I never saw the place vacant at all.

Q. What did Mr. Carroll do while he was there? A. He ran the sand pit, had the sand loaded there.

Q. Was he engaged in the same operation that Mr. Purley was in? A. Yes, sir; he was.

Q. Do you know anything about his having any arrangement with Mr. Fortenberry about the league? A. Yes, sir.

Q. How did you ascertain it? A. From Mr. Fortenberry.

Q. How long did Mr. Carroll remain there?

Q. How long did Mr. Carroll remain there? A. He

remained a year or two and maybe longer; I don't know just how long.

Q. What is your best recollection about how long he remained there? A. My best recollection is a couple of years.

Q. Well, during that time what do you say he was engaged in doing? A. Loading sand, having it done.

Q. How often? A. Well, every time I passed there they were loading sand; I did not stay there.

Q. I will ask you whether or not you know anything about any tie camp being located on the Felder league? A. Yes, sir.

Q. About when was that started? A. I think it was about 1901 or 1902.

Q. The first tie camp? A. Yes, sir, I think it was. If I have not got off about the dates, that is when it was; that is the trouble with me, but I think that is when it was; I don't know.

Q. I simply asked you about your recollection about it. I will ask you this: Who put in the camp there? A. Mr. Fortenberry.

Q. Acting for whom? A. Acting for the Texas Pine Land Association.

Q. Do you know that from what Mr. Fortenberry told you? A. Yes, sir; I do.

Q. How far was that camp, from what is now known as Fletcher on the Felder league? A. I think the first camp was not over three-quarters of a mile from there.

Q. About what direction was it? A. East.

Q. Is it east or north or what? A. It is east.

Q. I will ask you how long it was after the sand oper-

ation had commenced, that is the building of the house for the employes and the taking of the sand before the tie business was started; I will ask you before we come to that--

Mr. Gordon: I want him to answer the question.

Question withdrawn.

Q. Do you know when the railroad company got its track to Fletcher where they got the ties to build from there on? *A.* Yes, sir.

Q. Where? *A.* On the lands of the Texas Pine Land Association on the Bradley, Ellis, Montgomery and those leagues, and also on the Felder.

Q. I will ask you if the railroad company got ties as it built on? *A.* Yes, sir.

Q. I will ask you about what time it was that the operations for the ties commenced there? *A.* I think it was in 1893 or 1894.

Q. I thought, Mr. Scott, you were perhaps mistaken awhile ago--

Q. Well, take this first tie camp that was there; what does a tie camp consist of? *A.* They had a boarding house there and run a camp.

Q. A boarding house for the men to board? *A.* Yes sir.

Q. And a place for the men to sleep? *A.* Yes, sir.

Q. Did they have any teams around the camp? *A.* Yes, sir.

Q. Did they have any lots for them? *A.* Yes, sir.

Q. Now, how long in your opinion did the first tie camp remain there? *A.* I think about a year.

Q. At the first place? *A.* Yes, sir.

Q. Are you approximating that or are you sure that is the correct time? A. I am sure it run a year.

Q. You are sure it run that long? A. Yes, sir.

Q. Would you say it might have been run longer, Mr. Scott?

Q. Now, was there another tie camp established there on the league after the first camp? A. Yes, sir.

Q. What direction was that from the first camp? A. On east.

Q. What did they do down there? A. They made ties.

Q. Where did they get the timber? A. Off the Felder.

Q. What kind of place did they have to feed the men and for them to sleep? A. A boarding house.

Q. Did they have any stock around there? A. Yes, sir.

Q. Any place to keep them? A. Yes, sir.

Q. In taking this timber there—

Q. Now take the tie business, Mr. Scott, take the first camp, I will ask you from the time it came there whatever date that was, did it continue all the time or was it periodical?

A. The men were getting out ties as long as the camp was there.

Q. Well, take the second camp, how long was the second camp there within your recollection? A. I think the second camp was there six months, may be twelve.

Q. How were the operations conducted? A. They made ties and hauled ties and boarded there at the boarding house.

Q. Do you know of their being interfered with by anybody, I mean those people who established the camp and took out the ties, and cut the timber from the land? A. No, sir.

Q. Where were you living when Mr. Carroll moved out of the house at the sand pit? A. I was living about three miles above there on a piece of land I bought there.

Q. When Mr. Carroll moved out, state whether or not the house was occupied by anybody else? A. Yes, sir, by some darkies.

Q. By a darkey? A. Yes, sir.

Q. What did he do about the sand pit? A. He worked there.

Q. You mean he ran the sand pit? A. Yes, sir.

Q. Was he engaged in the same things the other men worked at or not? A. Yes, sir; he was engaged in the same work.

Q. How long did he remain there? A. I don't know exactly how long he remained there; I believe, though he remained there four or five years.

Q. How frequently did you see Mr. Fortenberry around there during the time this house was occupied there by the different parties? A. I would see him there very often.

Q. Do you know whether he conferred with them there on the occasion? A. Yes, sir; he talked with them there often.

Q. I will ask you this, Mr. Scott: From the time the house was first built there by Mr. Fortenberry until the present time, I will ask you whether or not you have known the house to be vacant during those periods? A. No, sir; I have not; there has been some one there all the time since they went to work there at the sand pit; they have been back there continuous.

Q. I will ask you if you know whether the operation of the sand pit there from the time it commenced until the pres-

ent time, has been carried on continuously, or only at periods?
 A. It has been carried on continuously all the time; of course I did not stay there every day; every time I passed there, and that was frequently, it was carried on all the time. I never found it vacant. I never found a time when there was no men there. I did not live right there, but I did pass there frequently.

Mr. Gordon: The statement of what the man said on p. 411 was excluded before.

Judge Kennerly: Yes, sir; I omit that.

Mr. Gordon: I now make the same objection to the question on p. 419.

Judge Kennerly: The question was not answered and I withdraw it of course.

Judge Kennerly: Beginning with the first question on p. 420 we read again down to the cross examination on p. 421.

Judge Kennerly: We wish to read the re-direct testimony of this witness.

Mr. Gordon: Then we want the cross examination read.

Judge Kennerly: We skip to p. 447 and read the re-direct examination and Mr. Gordon can read the cross examination if he wants to.

Q. I understood you to tell Mr. Gordon a while ago that the commencement of the taking of the sand was in 1905? *A.* Did I tell Mr. Gordon it was in 1905?

Q. Did you mean 1905 or 1895? *A.* I mean 1895; that is it, I very often make mistakes in those dates that way.

Mr. Gordon: I want to put the witness on the stand, and I can elicit what facts I want without reading the cross examination now.

Judge Kennerly: Not in any way admitting that any

title was in the grantor, and specifically stating that the deed is not offered for the purpose of title or admitting any title in the parties, but for the purpose of showing outstanding title with which the plaintiffs and interveners do not connect, even if they acquired title under the purported deed from Chas. A. Felder to John A. Veatch, we offer the deed on p. 104 of the printed record, dated October 17, 1845, from James Morgan to W. D. Lee, conveying 1850 acres of land out of the Chas. A. Felder league in Hardin County, Texas, and in connection with that we offer the original deed which was brought here by Mr. Walker at the last term of court for the same purpose. (This deed is elsewhere copied in this bill.)

Mr. Whitaker: We object to that deed, first, because its execution is not proven; second, because it is void for uncertainty of description, and there is no evidence to show that it was ever intended to be applied to the land in this case.

The Court: Is that all the objection.

Mr. Whitaker: Yes, sir; those I have stated.

Judge Kennerly: We offer this to show outstanding title out of the ancestors of the interveners that they don't connect with.

The Court: Has that part of Walker's testimony been read?

Judge Kennerly: Yes, sir; all of Walker's testimony has been read.

The Court: You have shown that it is over thirty years old and comes from the proper custody.

Mr. Whitaker: He must go further than that and show that he asserted claim under it, show some acts that show that he asserted claim under it.

Judge Kennerly: We will have several deeds to offer on the outstanding title.

The Court: The defendants offered a deed which I said I would pass on further along in the case, the deed from Chas. F. Felder to Joshua Smith, I don't want too many matters of that kind undecided because it would confuse me. Under my views of the record of the deed proving itself would allow this deed to go to the jury. At the end of the case I may not admit it. You can make a motion to strike it out. It seems to be conceded by Judge Kennerly that if the evidence is sufficient that James Morgan executed the deed to Wm. W. Swain on the 21st of November, 1844, for 2578 acres of land, then the deed from Morgan to Lee offered now becomes material. If I change my view, I will hear a motion to strike it out.

Mr. Whitaker: We except to the ruling of the court.

Judge Kennerly: Now, for the same purpose that we offered the deed from Morgan to Lee, we offer from the printed record on pp. 106, 107 and 108 certified copy of deed from Wm. D. Lee to Benjamin E. Green conveying the same property, recorded in Vol. O of the deed records of Hardin Co. (This deed is elsewhere copied in this Bill.)

Mr. Whitaker: We make the same objections to this deed without repeating them.

Judge Kennerly: We now offer for the same reasons and in the same matter that we offered the deed from Morgan to Lee, certified copy of a deed from Benjamin E. Green to Richard C. Washington, beginning at the bottom of p. 109 of the printed record, dated September 9, 1848, and conveying the same property and recorded in Hardin County June 18, 1889, in Book O, also recorded in Tyler County

in Book A p. 146 and 147. Filed in Tyler County August 17, 1849. (This deed is elsewhere copied in this Bill.)

Judge Kennerly: For the same purpose and in the same manner that we offered the deed from Morgan to Lee, we now offer a deed from Richard C. Washington and wife, Sophia Washington, to William Walker, dated September 22, 1848, and conveying the same property, filed for record in Tyler County August 2, 1849, and recorded in Vol. A. p. 148, filed for record in Hardin County June 18, 1889, and recorded in Vol. O p. 393. (This deed is elsewhere copied in this Bill.)

Judge Kennerly: For the same purpose and in the same manner we now offer from the record on p. 589 certified copy of a deed from James Morgan to Ellen Lee, dated March 12, 1863, and conveying an undivided half of 1850 acres out of the C. A. Felder headright, filed and recorded in 1866, I presume in Hardin County.

"State of Texas.

County of Harris.

Know all men by these presents: That I, James Morgan of the County and aforesaid for and in consideration of the sum of one dollar to me in hand paid the receipt of which is hereby acknowledged by Ellen Lee, also of said County and State aforesaid, have bargained, sold aliened and conveyed, and by these presents do bargain, sell, alien and convey to the said Ellen Lee all that certain tract or parcel of land situated in the County of Tyler and State of Texas and described as follows, to-wit: the undivided half of eighteen hundred and fifty (1850) acres of land, part of the headright of C. A. Felder.

In testimony whereof I have hereunto set my hand
at New Washington, this 12th day of March, A. D.,
1863.

J. MORGAN.

In presence of

KAS (JAS.) MORGAN,

JOHN J. JOHNSTON, JR.

State of Louisiana,

Parish of Orleans.

Before me, Theodore O. Stark, a commissioner of
deeds of and for the State of Texas, resident in the City
of New Orleans, State of Louisiana, personally appeared
John H. Johnston, Jr., to me well known, who being by
me, commissioner, duly sworn, made oath that J. Morgan,
whose signature appears to the foregoing deed or instru-
ment of writing, signed said deed in his presence and
that he, the said J. J. Johnston, Jr., and Kas Morgan
subscribed their names to the same as witnesses at the
request of the said J. Morgan.

JOHN J. JOHNSTON, JR.

Sworn to and subscribed before me, commissioner
aforesaid this fifth day of April, A. D., 1866.

(Seal)

THEODORE O. STARK.

Commissioner of Deeds for Texas in New Orleans.

Recorded May 16, 1866, at 9 o'clock a. m.

Judge Kennerly: For the same purpose and in the same
manner that we offered the deed from Morgan to Lee, we offer
in evidence certified copy of another deed from James Morgan
to Ellen Lee, dated October 7, 1865, for an undivided half
of 1850 acres out of the C. A. Felder survey, filed for record

in Tyler County July 4, 1866, recorded in Vol. F. p. 162 of the deed records of Tyler County.

"State of Texas,
County of Harris.

Know all men by these presents: That I, James Morgan, of the State and County aforesaid, for and in consideration of the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged by Ellen Lee, also of said County and State aforesaid, have bargained, sold, aliened and conveyed and by these presents do bargain, sell, alien and convey unto the said Ellen Lee all that certain tract of land situated in the County of Tyler and State of Texas, and described as follows, to-wit: The undivided half of eighteen hundred and fifty (1850) acres of land, part of the headright of C. A. Felder, the other undivided half being conveyed before to the said Ellen Lee deed bearing date of March 12th, 1863.

In testimony, I have hereunto set my hand at Houston this the 7th day of October, A. D., 1865.

J. MORGAN.

In presence of:

S. SHERMAN,
CAROLINE M. MORGAN.

State of Texas,
County of Galveston.

Before me, Edward T. Austin, Chief Justice of Galveston County, at Galveston, this the 9th day of April, A. D. 1866, personally came and appeared Sidney Sherman, to me known (as) one of the subscribing witnesses

to the foregoing instrument of writing, bearing date 7th day of October, 1865, who on oath said that he saw James Morgan, whom he knows, sign said instrument and that he (Sherman) signed said instrument as one of the subscribing witnesses to the execution thereof at the request of the said James Morgan.

Given under my hand and the seal of the County Court, at Galveston, this the 9th day of April, 1866.

EDWARD T. AUSTIN,
Chief Justice, Galveston, Texas.

Filed for record July the 4th, A. D., 1866, at 10 o'clock A. M., and recorded Vol. F pp. 162-3 of the records of deeds of Tyler County (then comprising said league.)

Judge Kennerly: The purported deed from James Morgan to W. W. Swain, that is, the record of the purported deed, from James Morgan to W. W. Swain was offered by the plaintiffs in this case as against the defendants, but not as against the interveners. We now offer on behalf of the defendants as against the interveners only, and not as against the plaintiffs, the record of that deed on the deed records of Tyler County, as a circumstance against the interveners to show the execution of that deed.

Mr. Whitaker: We object as against the interveners.

The Court: I will give the deed such construction as I think necessary to give it; whether it is offered or not against the interveners, I consider it in for every purpose.

Mr. Whitaker: We object because there is no proof of its execution, and the copy from the record is not a copy of the original deed.

The Court: The court overrules the objections and now states that the deed is now received for the same purposes that it was received before, to-wit: As a circumstance bearing on the question whether or not the deed itself was ever executed. In other words, I don't limit the purpose of its reception.

Mr. Whitaker excepts.

Judge Kennerly: It is offered for the purpose of showing outstanding title with which the interveners do not connect.

Judge Kennerly: In connection with our offer of the purported deed from Morgan to Swain, and as corroborative thereof, and as against the interveners, we next offer a certified copy from the District Court of Galveston Co. of a judgment recovered on October 22, 1840, by Hyde & Goodrich against W. D. Lee, and also certified copy of a judgment from the District Court of Galveston County recovered by Hyde & Goodrich against W. D. Lee October 22, 1840.

Mr. Whitaker: We object to these judgments because they are wholly irrelevant and immaterial to any issue in this case, and do not tend to show any fact which would be of assistance to the court and jury in determining whether James Morgan ever executed the deed to W. W. Swain.

Judge Kennerly: We think it is admissible to show that deed was probably executed.

Objection overruled.

Intervenors except.

E. T. ANDERSON, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Your name is E. T. Anderson? A. Yes, sir.

Q. Where do you live? A. At San Augustine.

Q. How long have you lived there? A. I have lived in the immediate town four years, and I was raised in the County.

Q. Do you hold any official position there? A. Yes, sir, I am Clerk of the District Court of the County.

Q. How long have you been? A. Two years.

Q. There has been offered in evidence in this case what is claimed to be a deed from a man named Charles A. Felder to a man named John A. Veatch. On this document claimed to be a deed are the names of two parties purporting to be witnesses, W. B. Barnett and Samuel Palmer. I will ask you whether or not you have examined any of the records for the purpose of trying to find trace of the names of these two persons, W. B. Barnett and Samuel Palmer? A. Yes, sir.

Q. What records? A. I examined the marriage records of San Augustine Co. from 1837 down to 1865.

Q. Was that as early as you found them there? A. Yes, sir. I also examined the probate records from A to C, which embraced the years from 1837 to 1877, about 40 years.

Q. What else did you examine? A. I examined the deed records of San Augustine Co.

Q. You mean the indexes? A. Yes, sir, and I examined the records of the District Court of San Augustine Co., and I found three Palmers there, Martin Palmer, Jos. F. Palmer and Jife Palmer.

Q. You found no trace of Samuel Palmer? A. No, sir.

Q. Everybody knows Martin Palmer? A. Yes, sir.

Q. You found no trace of Samuel Palmer? A. No,

sir. As to the name Barnett, I found no such name on the records; I found Burdettes.

Q. You found no W. B Barnett? A. No, sir.

Q. I will ask you at whose request you made that examination? A. At the request of Mr. Kennerly.

Q. That is my name? A. Yes, sir, you 'phoned me last night at nine o'clock, and I went in the office and worked until one o'clock.

Q. Was your examination thorough? A. Yes, sir, just as much so as it could be made.

Q. Were there any of those records that you did not include in the examination? A. No, sir, no indexes I did not examine.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. You were how many hours at work? A. Well, I got to work last night at 9:10. I left my home at nine o'clock last night and went to the office and worked until one, and I began this morning at six and worked until 9:10.

Q. You did not examine any of the records at all, but examined the indexes? A. Yes, sir.

Q. For these names to appear in the index, they would have to be grantor or grantee in a deed? A. Yes, sir.

Q. And before he would get his name on the index to the probate record, he would have to die, would he not.

Q. And before their name would appear the marriage record, they would have to marry, I suppose? A. Yes, sir; I presume so.

Q. You don't know what is in the records? A. No, sir; I only examined the indexes.

Q. The records cover a great number of pages? A. Yes, sir.

Q. There are a great many original archives, are there not? A. Yes, sir.

Q. You did not look into them? A. Yes, sir; I examined the archives.

Q. They are numbered numerically from one to one thousand? A. Yes, sir.

Q. They are put in bundles? A. Yes, sir.

Q. You took each paper separately and examined it? A. No, sir; I did not; they are in jackets, and as I would pull out a file, I would just look through for those names.

Q. You did not look at the papers themselves? A. No, sir; I did not look at the papers.

Q. He did not tell you to see if you could find anything about Wm. A. Daniel, did he? A. I don't remember that he did.

Q. Did you look for Col. Daniel? A. No, sir; I did not.

Q. You did find three different names of Palmer? A. Yes, sir.

Q. That indicated that there was quite a family of Palmers living in East Texas in the early days? A. I could not say as to that.

Q. Those three Palmers are the only ones that happened to be grantors or grantees in deeds in that County? A. Yes, sir.

Q. Did you not find them on the probate records or marriage records? A. Yes, sir; I found that one of the Palmers got married.

Q. Did you look up the marriage license to see whether Sam stood up with him when he got married? A. No, sir; I did not.

C. M. CALLOWAY, a witness for the defendants, testified as follows:

Questioned by Judge Kennerly:

Q. Your name is C. M. Calloway? A. Yes, sir; Chas. M. Calloway.

Q. Are you kin to our friend here on the jury? A. No, sir.

Q. Where do you live? A. At Austin, Texas.

Q. How long have you lived there? A. 45 years, not quite 45.

Q. What is your business? A. I am engaged with the General Land Office.

Q. In what capacity? A. As title and deposition clerk.

Q. How long have you been engaged with the land office in Texas? A. Since about '70, most of the time, a few years I was resting.

Q. In what capacity have you been engaged with it? A. Well, I believe I filled first the position of copy clerk, and corresponding clerk and my present position. I believe I have done most everything in the clerical line but those are the principal positions I have held.

Q. You came to Beaumont at whose request? A. Yours.

Q. Did you bring with you any record of the General Land Office? A. Yes, sir.

Q. I will ask you if this is one of the records you brought, this book? A. Yes, sir.

Q. What is that, Mr. Calloway? A. That is Book 23 of the Spanish archives of the General Land Office.

Q. That is a book on file in the General Land Office and part of the records? A. Yes, sir.

Q. What do you mean by Spanish archives? A. Well, it contains Spanish titles.

Q. You mean those titles which were granted by the Mexican Government previous to the time Texas won her freedom from that Government? A. Yes, sir; under the colonization laws of Coahuila & Texas.

Q. How long have those records been in the General Land Office to your knowledge? A. This is Zavalla's Colony, and as far as I can gather from the records, they were turned over to the Commissioner of the General Land Office at Houston sometime previous to 1840.

Q. They have been constantly in use since 1870? A. Yes, sir.

Q. Please examine that record and see if you find what purports to be the application of Chas. A. Felder for that league of land? A. Yes, sir; found on p. 853 of Vol. 23, such a league of land.

Mr. Gordon: You find some paper written in the Spanish language?

The Witness: Yes, sir.

Mr. Gordon: Do you read Spanish?

The Witness: No, sir.

Mr. Gordon: You don't know what it is?

The Witness: No, sir; I don't know. I have had it read by the Spanish translator.

Mr. Gordon: You cannot read what you find on that page?

The Witness: No, sir; except the index.

Q. That Chas. A. Felder that you have your finger on there is not Spanish? *A.* No, sir.

Q. That is in English? *A.* Yes, sir.

Q. The balance of it purports to be Spanish? *A.* Yes, sir.

Judge Kennerly: We offer a translated copy of it.

Mr. Gordon: I offered a translated copy.

Judge Kennerly: We offer a translated copy ourselves.

Mr. Gordon: I will state here and let it go in the record now that wherever the name Chas. A. Felder appears in the Spanish document that that is the protocol of the grant to Chas. A. Felder. In making this statement I do so with the qualification that it is not admitted that Chas. A. Felder wrote his name there.

Judge Kennerly: We have here a translated copy from the General Land Office of this document that Mr. Calloway has identified. We offer it in connection with the offer of the document he has in his hands.

Judge Kennerly: We now offer in evidence, both as a muniment of title and as a basis for comparison of signatures the original document which Mr. Calloway now produces, and in view of the fact that he must take that book back with him, we wish them to agree to permit us to file a photograph of that document, which, if it is not admitted that it is a true photograph, we will bring the photographer here.

Mr. Gordon: What is it you offer in evidence?

Judge Kennerly: We offer the original document Mr. Calloway has, but in view of the fact that he has to take the book back, we offer a photograph of the paper.

Mr. Gordon: I want to object to the original document offered. You just offer the signature, do you?

Judge Kennerly: I offer it as a muniment of title and offer it for the purpose of comparison of signatures.

The Court: How long can you be here, Mr. Calloway?

The Witness: I can be here two or three days and perhaps a week.

Mr. Gordon: I want to object to it for the purpose of becoming part of the evidence in the case. If it is to be used merely as an illustration to the jury and not as a part of the evidence, I would not object. I will want to make objections to the photograph, and will make them now as to this original document, first, that it is immaterial and irrelevant to any issue in the case and incompetent as evidence; second, because the name Chas. A. Felder appearing there is incompetent and irrelevant as a standard of comparison of handwriting because it is not shown that Chas. A. Felder wrote his name there, and because there was no law authorizing or requiring Chas. A. Felder to write his name there. As to the photograph—

Judge Kennerly: Mr. Dean took it and I asked him to take it the size of the original document, and I presume he did.

Mr. Gordon: I object to the photograph for the same reasons and further because the photograph is secondary evidence and is incompetent in that the primary evidence, the original, is here and now offered to be introduced.

The Court: I will permit the original to go in, but in doing so I am not pretending to say, and do not want to be understood by the jury as saying that I am making a finding that the signature of Chas. A. Felder to the instrument there was made by Chas. A. Felder. During the progress of the

case it will be necessary for the jury to investigate the signature and form an opinion for themselves as to whether that is Chas. A. Felder's signature. After making that explanation, I will overrule the objections. The photograph might be received to be used instead of the original.

Plaintiffs and interveners except.

[NOTE:—Original photograph ordered sent up to Appellate Court.]

Q. You have your book there? A. Yes, sir.

Q. I believe we had offered the application of Felder yesterday? A. Yes, sir; the Spanish archive was offered and received in evidence.

Judge Kennerly: Now I want the jury to examine this Spanish document. (It is shown the jury.)

Judge Kennerly: While they are examining this I want to read to the jury the translated part of the Felder grant.

Q. Did you find in the Land Office a letter purporting to have been written to the Commissioner of the General Land Office? A. Yes, sir.

Q. Have you that letter with you? A. Yes, sir.

Q. Let me have it please; where did you get this letter?
A. Out of the files of the Land Office.

Q. Out of the letter files of the General Land Office of Texas? A. Yes, sir.

Q. It is in your custody as an employe of the General Land Office of Texas? A. Yes, sir.

Q. Of course you can not leave it here; you must take it back with you? A. Yes, sir.

Q. What is the appearance of that letter as to ink and

the color of the paper? A. Well, it looks like it is a very old document.

Q. I will ask you if it is yellow? A. Yes, sir; very much. It looks like it might have been written at that date.

Q. What is the date of the letter? A. January 13, 1839, and I found it among the very ancient letters.

Judge Kennerly: We want to offer it as a standard of comparison.

Mr. Gordon: We have no objections, but we want the letter in for all purposes.

Judge Kennerly: We want to make certain objections to it going in for all purposes.

Mr. Gordon: If you offer it for a limited purpose, we offer it for all purposes.

Judge Kennerly: Let it go in for all purposes, I don't care. (Reads letter to jury.)

Judge Kennerly: It is offered particularly on the claim by the defendants that Chas. A. Felder did not sign the name Chas. A. Felder, W. B. Barnett did not sign the name W. B. Barnett, and that John Veatch signed both the name Chas. A. Felder and W. B. Barnett to the purported deed. It is also offered to show by comparison of signatures that the name Chas. A. Felder to John A. Veatch on the back of the purported deed was written by John A. Veatch. I want it to go before the jury on the different signatures and writings of these men.

Mr. Gordon: Read the letter.

Judge Kennerly: All right, I started to read it.

Beaumont, Jan. 18, 1839.

Mr. J. P. Borden,
Sir:

A few days since a Mr. Thomaston, a Deputy surveyor in this County returned from Houston, bringing the information that Mr. Borden had discovered two titles for a sitio of land each, granted to *John A. Veatch*, showing fraud, of course, on the part of the said Veatch. Now, not having the smallest doubt but that Mr. Borden is as anxious to ascertain truth as to detect error, I am confident he will make a careful and impartial examination of the documents above alluded to,—upon which he will find that John Allen Veatch of Sabine is not John Alexander Veatch of Nacogdoches. For gentlemen acquainted with both the above individuals I refer you to Gen. T. J. Rusk, Gen. Sam Houston, and the representatives from Nacogdoches County. This investigation I request as an act of justice & hope you will have the kindness to immediately examine the signatures to the original documents.

Yours with respect,

JOHN A. VEATCH.

Judge Kennerly: We want the jury to examine and compare the signature of John A. Veatch to the letter and the name of Chas. A. Felder to this deed purporting to be from Felder to Veatch, and also compare it with the name W. B. Barnett who purports to be a witness to that deed.

Judge Kennerly: In connection with the offer of that letter, and in view of the fact that it has to be taken back, we offer a photograph of it to make a permanent record.

Mr. Gordon: Our objection to the photograph is that it is immaterial and irrelevant, second, that it is secondary evidence.

The Court: I overrule the objection and in making the ruling, the court states that the original letter having been received in evidence without objection, and it appearing to the court from statements made by the witness that it is an archive of the General Land Office, and cannot remain in the court, the court permits the photograph to be received and placed among the files on account of the fact that the original cannot be permitted to remain here.

[NOTE:—Original photo ordered sent up to Appellate Court.]

Q. I now turn that letter back to you, Mr. Calloway. The book you brought here is Vol. 23? A. Yes, sir.

Q. Will you look and see if you find in that volume of the old Spanish archives that purports to be the application of John A. Veatch for his headright under the Mexican Government? A. Well, there are two here, Judge.

Q. There are two there? A. Yes, sir.

Mr. Gordon: It is on p. 1243 and p. 1248.

Q. There are two there? A. Yes, sir; I find on p. 1243, the application of John A. Veatch.

Q. How is it spelled? A. Veatch.

Q. Do you find another one? A. Well, on p. 1247, and it is spelled the same way, Veatch.

Q. Signed John A. Veatch in each instance? A. Yes, sir.

Q. What is that? A. 5538670 square varas.

Q. And the other is what? A. 9 million square varas.

Q. Now, the two make up a league, a headright? A. Yes, sir; a little over 12 million square varas.

Q. Now, Mr. Calloway, examine the A in the name of John A. Veatch in the instrument as it appears on p. 1243; how is that made, a round A or a sharp top A? A. It is a round A.

Q. How is the A made when he signs on 1247? A. Well it is a sharp-topped A.

Judge Kennerly: Now as a standard of comparison of signatures, we offer in evidence both these signatures and particularly the signature on p. 1243 of this book where the A is a round A as it appears in the purported signature of Charles A. Felder to the purported deed, and we want the jury to examine that round-topped A.

Mr. Gordon: We have no objections.

(Jury examines the record book.)

Judge Kennerly: In connection with the offer of the instrument on p. 1243, we offer a photograph of that signature. We offer it for the same reason that we offered the others.

Mr. Gordon: We make the same objection.

The Court: The ruling is the same with the same explanation.

Plaintiff and interveners except.

[NOTE:—Original photograph ordered sent up to Appellate Court.]

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. The John A. Veatch about whom you are testifying located a portion of his headright in Jefferson County, and the remainder in Hardin County, and it is so recognized in the Land Office? A. Yes, sir, two titles.

Q. The 960 acres in Hardin County is that the first or second you mentioned? A. The first I think is given here in square varas, about that, 5538670 square varas.

Q. About 960 acres? A. Yes, sir.

Q. What was the date of that title? A. October 12, 1835.

Q. Now, what is the acreage of the one located at Spindletop in this county? A. 9 or 19 million, I don't see it put down here, it is all Spanish pretty much.

Q. What is the date of that application? A. September 24, 1834. I think I have a memorandum of that and it is October 14, 1835. No, February 6, 1835 is the date. I got that from another source.

Q. So not having procured his full headright in February, 1835, in Jefferson County, he located the remainder of his headright in Hardin County in October following? A. Yes, sir; that is my recollection of the way it is understood to be.

Q. Now, the John A. Veatch headright, where is that located? A. There are two of them; the league is in Trinity County.

Q. Where is the other one? A. Well, he got 10 leagues, but it was issued after the closing of the Land Office and invalidated by law.

Q. The John A. Veatch headright was located in Trinity County? A. Yes, sir.

Q. Have you that in the book? A. No, sir; I did not bring the book; I think I have a memorandum of that.

Q. That was a full league? A. Given as a league, yes sir.

Q. I will ask you if it is not a fact well known and

recognized in the Land Office that Dr. John A. Veatch was one of the official surveyors of Zavalla's Colony? A. I don't remember exactly Mr. Gordon, although I have a general idea; I think he was one of the official surveyors, but I am not sure of that.

Q. Do you remember the application for a grant to John M. Henry? A. No, sir; I don't; perhaps I have examined it.

Q. Do you remember whether it is a fact that that application was never signed by anybody? A. I don't remember that. There are numbers of them in that condition—I mean not signed by the applicant, but by attorney.

Q. Some of them were never signed at all? A. I don't remember to have seen one that was not. I believe I made a statement about that here once under a misapprehension. I don't remember to have seen any; there might have been. I do not remember any particular one now.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. When signed by attorney, it shows on its face that it is by attorney? A. Yes, sir.

Q. In other words, "John Smith, by Peter Jones, attorney"? A. Yes, sir; that is what I mean.

Q. You say that John A. Veatch was one of the official surveyors? A. Yes, sir.

Q. So was David Brown? A. Yes, sir; I remember David Brown very well, and I have an indistinct recollection about Veatch, but not as well as about Brown.

Q. Look through the book and see if you don't find both the names David Brown and John A. Veatch, first Brown

and then Veatch and then Veatch and then Brown all the way through that volume as surveyors? A. I see one David Brown and another David Brown and another David Brown, and John A. Veatch, and John A. Veatch again and John A. Veatch again.

Q. It runs through about that way? A. Yes, sir; I think so.

Q. Now, this man Veitch Mr. Gordon asked you about, how did you spell that name? A. Veitch, I think.

Q. You said there were ten leagues of land to him about the closing of the Land Office? A. Yes, sir; it was issued after the closing of the Land Office in 1836.

Q. The question seems to have been up in the letter written here that he was not the same man as this man John A. Veatch, was it not.

Mr. Gordon: The letter shows for itself.

Q. Do you know how that question was settled? A. No, sir; I don't.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. Do you know David Brown's real name? A. No, sir.

Q. Did you know that his name was Robt. Stevens and that he came from South Carolina and changed his name to David Brown? A. I don't remember to have heard that at all.

Q. Did you ever hear that John A. Veitch was for many years sheriff of Nacogdoches County? A. No, sir.

Q. Do you know W. B. O'Quinn who was district attorney up there and in the Legislature? A. Yes, sir; I knew him.

Q. Don't you know he is a grandson of John A. Veitch?

A. No, sir; I never heard him mention that.

RE-DIRECT EXAMINATION.

Questioned by Judge Kennerly:

Q. You had this record in the trial of the case before?

A. Yes, sir.

Q. This identical record? A. Yes, sir.

Q. Do you remember two witnesses testifying as to the similarity of that signature with the other? A. I remember some, don't remember how many.

Judge Kennerly: In this connection we want to read the testimony of H. W. GARDNER given on p. 374 of the printed record:

Q. Where do you live? A. I live in Beaumont.

Q. In what business are you? A. The banking business.

Q. What bank? A. The Texas Bank & Trust Company.

Q. How long have you been in the banking business? A. Ten years.

Q. What position do you hold with the Texas Bank & Trust Company? A. Assistant cashier.

Q. I will ask you in the course of your business in the banking business and employment you have had any experience in comparing signatures on the question of their identity? A. Yes, sir.

Q. How much experience have you had in that line? A. Six or seven years.

Q. During the course of that time have you compared signatures frequently or infrequently? A. Frequently.

Q. Has it been your duty in the course of your employment in the bank to compare different signatures? A. Yes, sir.

Q. Would you consider from your experience—

Mr. Gordon: To save time, we will admit that he is qualified.

Q. I will ask you to take this old document I now hand you, the purported original protocol from the government of Coahuila and Texas to Charles A. Felder produced from the custody of Mr. Calloway from the general land office; I will ask you if you see what purports to be the name Charles A. Felder written on that document? A. Yes, sir.

Q. I now hand you what purports to be the original deed from Charles A. Felder signed Chas. A. Felder to John A. Veatch, dated June 18, 1839—I will ask you if you see what purports to be the name Chas. A. Felder signed to that instrument? A. Yes, sir.

Q. I will ask you to compare the signature of Charles A. Felder to the original protocol with the signature of Chas. A. Felder to this property, the original deed, and state whether or not, in your opinion, based on your experience in the comparison of handwritings they are written by the same hand or not written by the same hand?

Q. Answer the question? A. No, sir, I don't think it is.

Q. What is your answer? Speak so the jury can hear you. A. I don't think, in my opinion, that the same person signed the two instruments.

Q. I will ask you what are the points of dissimilarity between the two instruments, those two signatures? A. There

is no similarity to me; they are entirely different in nearly every way.

Q. I will ask you to examine the signature or rather name Charles A. Felder written on the purported testimonio of the original title from the government of Coahuila and Texas to Charles A. Felder which I now hand you and compare that name with Chas. A. Felder written on the purported deed from Felder to Veatch; this is the signature to the paper introduced from Mr. Walker's custody; state if those two signatures, in your judgment, are written by the same hand? A. No, sir, they are not.

Q. I will ask you if you notice any points of similarity between those two signatures? A. No, sir, I do not.

Q. I will ask you to compare the name Charles A. Felder as written on the protocol which I first handed you with the name of Charles A. Felder as written on the testimonio of the written title—the original title which I just handed you, and which was produced from the custody of Mr. Walker, and state whether in your opinion that is the same writing? A. Yes, sir, I think they are.

Judge Kennerly: At this point we offer as a standard of comparison the Spanish document which came from the custody of Mr. Walker at the last term of court in order for the jury to compare the signatures. It was this instrument that the witness Gardner now starts to testify about. We do not offer the cross examination. I read down to the bottom of p. 377. (Original document ordered sent up to Appellate Court.)

Cross examination offered by Mr. Whitaker.

CROSS EXAMINATION.

Questioned by Mr. Whitaker:

Q. I will ask you to compare the name Charles A. Felder in the body of the instrument at the place it first appears, compare that name with the name of Charles A. Felder on the testimonio. I will ask you if those two signatures are the same? A. No, sir, I would not say so.

Q. You would not decide them to be? A. No, sir; I don't believe I would say they are the same.

Q. Do you see any similarity? A. Yes, sir, there is some; it could have been the same signature; it is written with a good deal heavier pen, it looks like, with darker ink than the other.

Q. There is four years difference in the ages of the signatures, they were not written at the same? A. No, sir, I don't believe I would say they are the same.

Q. You say they are not the same? A. Yes, sir.

Q. Now, I will ask you to compare the name Charles A. Felder written near the conclusion of the deed with the name Charles A. Felder higher up in the body of the deed; I will ask you if that is the same handwriting? A. Yes, sir, that looks very much the same.

Q. Now, compare the name Charles A. Felder near the end of the deed with the name Charles A. Felder in the testimonio? A. They are a good deal alike; I don't know whether it is the same or not. They are alike; I don't believe I would take it for the same signature.

Q. They are really alike, but you don't believe you would take it for the same signature? A. Yes, sir.

Q. Why would you not, Mr. Gardner? A. Well, I don't know.

Q. You say you don't know? A. There is a difference in his "a" there, he makes it differently is one thing, his "a's" are not exactly the same, near the end of the deed it is a good deal longer than the other one.

Q. How about the capital "Fs"? A. There is not so much difference; he does not cross them the same exactly is the only difference. In that his "d" is altogether different. You cannot tell much about this, he writes "Charles" out there in the testimonio and abbreviates it in the deed. In one instrument the "d" is taller than it is in the other.

Q. Larger you mean? A. Yes, sir; it is a good deal larger.

Q. How about the capital "C"? A. He seems to have stubbed his pen there and it is blotted up.

Q. Now, I will ask you if it is not a fact, considering those papers, one made in 1835 and one made in 1839 at a different period, four years afterwards, if the resemblance between those two signatures is not very striking considering the period of time intervening? A. There is some resemblance; yes, sir.

Q. I will ask you if it is not a fact that a man never does sign his name exactly alike, any two signatures precisely the same way? A. Yes, sir, I think that is a fact.

Q. I will ask you if a man's signature does not have some little slight difference either from practice or non-practice by the lapse of time? A. Yes, sir, I would think so.

Q. And yet you say there is a striking resemblance between the name Charles A. Felder in the deed and the name Charles A. Felder in the testimonio? A. Yes, sir, there is some resemblance.

Questioned by Mr. Gordon:

Q. Do you find the signature in the latter part of the deed Charles A. Felder, with the name "Charles" abbreviated exactly like the signature in the same deed in the beginning when it is written out in full Charles A. Felder; now look at these two, you stated they were similar. You find these two names exactly alike in the same deed? A. No, sir, there is some difference in there.

Q. Would you say a different hand had written the two signatures in this deed? A. I think that is the same hand, it looks the same.

Q. Is not the difference about as great between those two signatures in the same deed as the difference is between the one just examined and the testimonio? A. How is that?

Q. The question is now, is not the difference just about as great between the two names in the deed, the last name in the deed and the testimonio? A. No, sir.

Q. What is the difference, point out the difference? A. They are altogether different.

Q. Well, point out some difference between them? A. I speak about this one down here.

Q. I don't mean this one down here; I speak about this one here in the body of the deed, between the first Charles A. Felder named in the deed, and the last Charles A. Felder named in the body of the deed? A. Give me that question again.

Q. The question is this: Here are two signatures in the body of the deed that differ from each other, are there not? A. Yes, sir.

Q. Now, then here is Charles A. Felder written in the Spanish testimonio that looks very much like the same name

written in the body of the deed as you stated a while ago? A. Where is it in the body of the deed?

Q. Right here. The question is this: These two signatures in the body of the deed differ, but you would say that the same man wrote them? A. Yes, sir.

Q. Now, I will ask you if they differ any more from each other than the name Charles A. Felder in the testimonio, this Spanish paper, differs from either of the other names in the body of the deed? A. No, sir, this one differs from either of those.

Q. In what respect do you find the difference? A. Well, there is a difference in the "C." The "C" curls around here in this one and does not in either of these, and the "A" is different in both of these than it is in this one and the "F" is a deal, a good deal different. His "e's" both in this instrument are lapped and in this they are more like "i's." His "d" has a long top on it here and this one has none.

Q. Look a little closer and see if you see it? A. I think I see it. The "r" is more like the others; the last "r" is very similar in these two, but in this one is it a little different.

Q. Now, Mr. Gardner, is it not a fact that when you consider that they were written four years after what was written in the Spanish paper and in different ink and with a different pen, a heavier pen, that the similarity between these three signatures is very striking when you consider those conditions? A. I think these two are very striking.

Q. I don't speak of the two written at the same time, but speak of them as compared to the other one, when they were written at a different time with a different pen and different ink, is it not very striking in appearance as the

same signature? A. No, sir; I don't think it is very striking; I simply think there is some resemblance.

Q. Would you say as an expert that the same man did not write both signatures? A. I believe I would; yes, sir.

Q. You believe you would say that the same man did not write them both, you think you would say that? A. I think so.

Q. Do you mean so say that would be your opinion or do you state that as a positive fact?

The Court: He is only testifying to his opinion.

RE-DIRECT EXAMINATION READ BY JUDGE KENNERLY.

Q. I will ask you one more question; from your experience in handwriting, judging handwriting and passing on signatures in your duties as a banker, I will ask you whether you entertain any doubt as to whether the same man wrote this name Charles A. Felder to the deed, the final signature to the deed, if you have any doubt as to the correctness of your statement when you say that the man that wrote the final signature to the Felder deed was not the man that wrote the other names; have you any doubt as to the correctness of that statement? A. Yes, sir, of course, I have a doubt. I don't think it is like any of the others.

Q. Are you positive enough to swear that in your judgment this name was written by a different man from the man who wrote the name Charles A. Felder in the other instrument?

The Court: He stated that in his opinion the same man did not write them.

The Witness: Yes, sir, I think I would say that. It does not look like any of the others.

Q. I will ask you, Mr. Gardner, whether in your opinion the name Charles A. Felder that appears to be signed at the end of the application, the name Charles A. Felder was written by the same man who wrote the body of that instrument in full, or is it your opinion a different hand or in your opinion by a different hand, supposing it was written at the same time? A. No, sir, I don't think so except the two words right behind it; they look very much like it.

Q. Then you think the body of this testimonio here was written by a different man than the man who signed the name Charles A. Felder right here? A. Yes, sir.

RE-CROSS EXAMINATION READ BY MR. WHITAKER.

Questioned by Mr. Gordon:

Q. I will ask you whether or not the signature in this Spanish testimonio in your judgment was written by the same hand that wrote the signature Charles A. Felder in the protocol, both signatures written on the same day with the same character of pen and ink, and one being faded a little more than the others? A. They are very much alike; yes, sir.

Q. You think they were written by the same man? A. Yes, sir, I believe so.

Judge Kennerly: We offer the testimony of J. T. SHELBY commencing on p. 383 of the printed record.

Q. Your name is J. T. Shelby? A. Yes, sir.

Q. What business are you in? A. Connected with the Gulf National Bank.

Q. How long have you been in the banking business? A. Ten years.

Q. In what capacity are you engaged with the bank at this time? A. As assistant cashier.

Q. How long have you been with the Gulf National Bank? A. Seven years.

Q. I will ask you if in the course of your employment with the Gulf National Bank and in the banking business you have had occasion to examine numerous signatures in reference to their identity and make a comparison of signatures and handwriting. A. Yes, sir.

Mr. Gordon: We admit that he is qualified.

Q. Take this purported original protocol of the title from the government of Coahuila and Texas to Charles Felder and see if you see written thereon the name Charles A. Felder?

A. Yes, sir, I do.

Q. Please now take the purported original deed from Charles A. Felder to John A. Veatch which I now hand you, and tell me if you see thereon Chas. A. Felder? A. Yes, sir.

Q. I will ask you to compare the name Charles A. Felder there on the protocol with the name Chas. A. Felder as it appears on the purported original deed, and state whether or not in your opinion based on your experience they were written by the same hand, or if they appear to be the same signature?

A. Not in my opinion they do not agree.

Q. In your opinion would you say they were not written by the same man? A. In my opinion it does not look like the same person wrote both signatures.

Q. I will get you to state what are the points of dissimilarity you notice between those two signatures? A. Well, in the first place, none of the letters, the capitals, agree.

Q. None of the capitals agree? A. No, sir.

Q. In what other particulars do you see a dissimilarity

in them? A. One is much finer handwriting than the other. The "e's" are all open in one signature, and on the other they are closed.

Q. Anything further? A. And the ending up of the signature does not agree.

Q. Do you notice any points of similarity at all between them, generally speaking; in your opinion are the signatures at all similar? A. No, sir, they are not.

Q. I will ask you now to state whether in your opinion the signature of Charles A. Felder written on the protocol which I handed you a moment ago is written by the same hand as the signature Charles A. Felder to the testimonio of the title which I now hand you? A. There is some similarity there, but there is a difference in the signatures?

Q. State in your opinion what the differences are? A. Well, the capitals are different and the shading is a little heavier. There is a difference in the capital "C" in that one and this one, and there is a difference in the "r" here—the final "r" in Charles. Here it is different from the other one. There seems to be a difference in the "r's" in the two.

Q. In your opinion, assuming that they were both written on the same day, are they in the same handwriting? A. In my opinion they are not.

Q. I will ask you if it is not a fact that the same man that wrote Charles A. Felder here in the protocol wrote Charles A. Felder there in the testimonio? A. In my opinion, they do not agree, one being the signature to the application in the testimonio and the other being the signature to the application in the protocol. The two signatures I have before me do not agree in my opinion.

Q. What is the difference there? A. Well, the capitals

are different, the "A's" there being a little hook on one "A" that does not appear on the other, and the "F's" are different and the "D's" are different.

Q. The same party that wrote this signature here, wrote this one? A. In my opinion, the signatures agree.

Q. The person who wrote the signature at the end of the application in the protocol is the same hand who wrote the name Charles A. Felder at the end of the protocol? A. Yes, sir.

Q. In order to fix the firmness of your conviction, I will ask you whether you have any doubt in your opinion that the person who wrote the name Charles A. Felder at the end of the application in the testimonio was not the person who wrote the body of that instrument, the body of the testimonio, whether or not you feel reasonably certain of your statement? A. Your question is: Did Charles A. Felder write the body of the instrument?

Q. You have stated that, in your opinion, the man who wrote the body of the instrument is not the man who wrote Charles A. Felder there, do you feel reasonably certain of that? A. Yes, sir.

CROSS EXAMINATION OFFERED BY MR. WHITAKER.

Questioned by Mr. Gordon:

Q. Is it not a fact that no signatures are ever exactly the same although written by the same person and written about the same time? A. State that again.

Q. Is it not your experience that there are no two signatures written by a man practically at the same time that are exactly alike? A. There is usually some small difference; yes, sir.

Q. Now, if they are written with different shading, does not that difference appear much greater than if written with the same pen? A. Yes, sir.

Q. Now, these two documents purport to have been executed the same day. I will ask you if the name Charles A. Felder in the protocol is not much heavier than the name Charles A. Felder written in the testimonio? A. Yes, sir.

Q. Now, then, there appears the name Charles A. Felder in the top of the testimonio, and later on the name appears written Charles A. Felder, examine those two names and state whether or not in your opinion they were written by the same man? A. In my opinion they were written by the same man.

Q. Now, examine the "A" in the protocol and the "A" in the two names in the testimonio, and state whether or not they are practically the same, the capital "A's"? A. Well, there is a great deal more similarity than the two written on this paper; they are almost identical; I mean the testimonio, but there is a difference in the "A" in the protocol and the two in the testimonio.

Q. I will ask you, taking into consideration the fact that the shading is different, and evidently the pen used in the testimonio, I would ask you if you would say they were not written by the same person? A. In my opinion they were not.

Q. Now, then, examine the name Charles A. Felder written four years afterwards in the original deed which I show you and compare it with the testimonio, the two names appearing in the testimonio, which was written four years earlier, and state whether or not in your opinion it was the same man who wrote both names? A. In my opinion the

same man that wrote the deed wrote the names in the testimonio.

Q. That is what you mean? A. Yes, sir.

Q. Now, examine the name Charles A. Felder at the latter part of the deed dated in 1839 with the Chas. A. Felder written in the testimonio, and tell me whether or not you think they were written by the same man, the difference in time being four years? A. There is a similarity between them.

Q. Well, is it not a fact that they are substantially the same, taking into consideration the four years difference in time and a different type of pen and ink used? A. The Charles A. Felder in both documents is very similar, but there is a difference in the Felder.

Q. You would not say that they were not written by different men, would you? A. No, sir.

Q. You would not? A. No, sir.

Q. What is your opinion about it? A. The signatures are very similar, and I believe they were both written by the same party.

Q. Now, I will ask you to look at the general handwriting in the Spanish testimonio you have and compare it with the protocol, and state whether or not the testimonio and the protocol are in the same handwriting, and written on the same day? A. In my opinion they were written by the same party.

Q. Now, then, examine the signature of Charles A. Felder in this testimonio, and state whether or not, in your opinion, this signature was written in the testimonio by the same party who wrote the body of the instrument, the difference being that one is Spanish words and the other English words, I will ask you especially to take some of the capital letter there

for comparison, and state whether the man that wrote that signature wrote the entire instrument? A. In my opinion, it was not.

Q. How is that? A. In my opinion, it was not.

Q. But in your opinion the man that wrote the name Felder in this deed, Charles A. Felder in the deed, wrote the same name in this testimonio?

Q. Now, I want to ask you one other question. You would not swear that the same scrivener who wrote the body of this testimonio did not also write the name Charles A. Felder in the testimonio, would you? A. Put that again.

Q. You would not be willing to swear that the man who wrote this testimonio in Spanish did not also write these names Charles A. Felder in the body of the paper?

Mr. Hightower: He said that in his opinion the same man did not write that signature down there.

The Court: If the witness has already answered it, I did not hear his answer.

Q. I will ask you to look at the other Charles A. Felder in the testimonio, right here in the lower part of the testimonio, and will ask you if it is not a fact that the handwriting of Charles A. Felder in the lower part of this testimonio is the same as the Spanish words in the testimonio as near as the English words could be similar to the Spanish?

Mr. Gordon: With the exception that one is English and the other is Spanish, if it is not in the same handwriting as to that writing there and this here Ayorto veinte, the capital "A" quoted in that Spanish is the same handwriting as the capital "A" in the Charles A. Felder.

The Witness: Yes, sir, it is the same.

Q. Is there any difference in the Spanish words just

quoted and the balance of the document, or were they written by the same man? A. There is a similarity between them. The handwriting above appears to me different from the writing below.

Q. You mean that the writing in the body of the instrument appears to be different from the two Spanish words read? A. Yes, sir, the writing above here is different, in my opinion, than this written here.

Q. The words just quoted? A. Yes, sir.

Q. You would not say they were written by different hands, would you? A. I don't believe the same party wrote this here that wrote the letters at the bottom here.

Mr. Butler: You don't believe the same party wrote the body of the testimonio that wrote the two words here that Mr. Gordon called your attention to a while ago? A. Yes, sir.

Mr. Gordon: I want to read that whole clause in Spanish "Nacogdoches, Ayosto, Viente y Cinco." That means Nacogdoches, August 25, does it not? A. I don't know what it means. These words August 25, as you say, in my opinion, are in the same handwriting as the Charles A. Felder.

Q. Now, look at Charles A. Felder written in the potocol. The last time it appears in the protocol, and tell me whether or not it is in the same handwriting as the Charles A. Felder written in the testimonio in both places? A. In my opinion, they are the same.

RE-CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. I will ask you whether or not there is any standard of certainty by which a handwriting expert such as you claim to be can pass upon writings that are made by the same man

with different ink at the same time, and especially where there is an intervention of four or five years? A. In my opinion, there is room to be a difference in that length of time with different ink.

Q. Is it not a fact that there is not much reliability in that character of testimony?

Mr. Hightower: I don't think that is a proper question or a proper matter for the witness to testify about.

Question withdrawn.

Q. I will ask you if it is not a fact and so recognized by handwriting experts that whether or not a man made a signature is largely a matter of speculation, and is a difficult matter to ascertain as a matter of opinion and expert testimony? A. There is always room for doubt, in my opinion, regarding handwriting where there has been several years elapsed; in the experience I have had that has been the case.

JUDGE C. A. WOODS, being re-called by defendants, testified as follows:

Questioned by Judge Kennerly:

Q. How far is it on an air line from Jasper to Liberty, straight through? A. Well, I only know from the investigation I made on a map of Texas.

Q. About how far is it? A. Well—

Mr. Gordon: If he is only testifying from a map and don't know the distance on the ground, I don't think he could testify.

Objection overruled.

Q. How far is it from Jasper to Liberty? A. 85 or 90 miles.

Judge Kennerly: Our cross action in this case is for

damages for timber cut and sand removed and other damages to the property and also for rents and profits. The defendants dismiss as against the parties to this suit such action for timber cut and sand removed and rents and profits and also damage to the property, leaving in the case their cross action on the title.

Judge Kennerly: We offer the ninth interrogatory and answer thereto from the deposition of MARY W. MONTGOMERY, said deposition being taken November 8, 1912, this offer being as against the interveners only, and for the purpose of showing outstanding title with which the interveners have not connected. In order to make that answer clear, we wish to read also the sixth and answer.

Mr. Gordon: That has all been read. I read it myself.

Ninth Direct Interrogatory:

State any other facts which may be within your knowledge concerning said matter which would tend to be of benefit to either plaintiffs or defendants in said case, whether you have been specially interrogated concerning the same or not.

Answer:

I know my father claimed an interest in the land in Texas in the Felder league during his lifetime and up to the time of his death. I acted for my father as secretary in writing letters and copying documents which referred to this property. I have seen the deeds referred to in interrogatory No. 6, or copies of the same in my father's possession, but I do not know where those documents are, or what became of them except that I believe that those which were not sent by him to his Texas agents were destroyed by my mother after my father's death.

Sixth Direct Interrogatory and answer as follozes:

Please search among all your papers and in every place where any papers that refer to this land may be and see if you cannot find the following papers: 1st: Deed from Chas. A. Felder to John A. Veatch, dated June 18th, 1839: 2nd: Deed from John A. Veatch to Jas. Morgan, dated March 15th, 1841. 3rd: Deed from Jas. Morgan to Wm. W. Swain, dated Nov. 21st, 1844. 4th: Deed from Wm. W. Swain to Robt. Rose, dated Jan. 5th, 1846: 5th: Deed from Robt. Rose to John N. Rose, dated Aug. 4th, 1854. 6th: Deed from John N. Rose to Wm. M. Goodrich, dated Jan. 1st, 1871.

If you find any of the above papers, please attach them to your answer and mark them for identification; have you made diligent search for the above papers; if so, please state what search you have made and what were the results of the search.

In Answer to the Sixth Interrogatory She Saith:

I never had such in my possession. My mother who had such of my father's Texas papers as were in his residence after his death, told me that she had had many of these papers burned because they were so voluminous and she had no place to keep them.

I have made no search here for the reason that I do not know where to look for such papers and believe that such of the papers as were in the house of my father at the time of his death have been burned.

Judge Kennerly: We offer the admission shown on p. 636 of the printed record, as follows: It is admitted that the Felder League in question was a part of the territory that

was formed from Liberty County into Menard, and that it was afterwards a part of Tyler County, and later of Hardin County. The different acts of Congress and the Legislatures will show the dates.

Judge Kennerly: The court reserved the ruling on the offer of the certified copy of the deed from Chas. F. Felder to Joshua Smith. Before closing, we, would ask if the court is now ready to rule on that point.

The Court: I think you are entitled to a ruling on that question before they proceed to develop the rebuttal proof, and I will sustain the objection to the deed. Before the argument begins, if I decide to restrict the ruling, I will do so.

Defendants except.

Judge Kennerly: The court also reserved the ruling on the admissibility of the Lancaster field notes and original patent offered for the purpose of showing outstanding title.

The Court: I think it is clearly shown that the Lancaster field notes were prepared first, and the evidence shows that the title was issued to Chas. A. Felder first, and on that ground I sustain the objection.

Defendants except.

Judge Kennerly: The court will recall that prior to the beginning of the trial a motion for restitution was made. As to that motion we wish to now dismiss our application for a judgment or order with reference to the timber cut, but insist on our motion for a restitution of the \$1600.00. We now at the close of our testimony call the court's attention to the motion and ask a ruling.

The Court: The court states that he still continues that matter for the present, and will not grant the prayer of the motion at this time.

Defendants except.

Defendants rest.

Mr. Gordon: We now offer in evidence the will of William M. Goodrich, a certified copy of the will duly probated in 1881 in Polk County, Texas. The copy of from Vol. E, p. 149 of the minutes of the Probate Court of Polk County. The certified copy of certified November 23, 1914 under the hand and seal of the clerk of that court. It is not in the printed record, and permission was granted us to offer it later.

"WILL.

In consequence of the change in my financial condition and the further depreciation of my Real Estate in New Orleans, I have determined to cancel and annul the Will and Testament made by me on the 12th Feby. 1878, and signed before R. North Esqr. Not. Public of *Pokcepic* and replace and substitute therefor the following as my last Will & Testament, hereby revoking & making void all previous Wills & Testaments made by me.

First. I bequeath hereby to my three Daughters, Cornelia Griswold Goodrich, Annie Louise Goodrich and Mary Willis Goodrich, all my estate real and personal of whatever description, deducting however from my daughter Mary's share of the Texas lands, the ten thousand acres which I gave her on Christmas day last.

Second. I wish to have it understood however that my wife Cornelia Plat Griswold is to have the usufruct & interest of my estate during her mortal life.

Third. I give and bequeath to Emile F. Rolland of France, One Hundred acres of land in Texas to be selected by my executor & also five hundred francs in Gold; And I hereby constitute and appoint my wife Cornelia the sole Executor of this my last and only Will and Testament without giving any security.

Signed this Fourth day of February, 1879, Southwood Pokespie, in presence of C. W. Griswold, F. N. Griswold,

WM. M. GOODRICH."

Judge Kennerly: No objections.

Mr. Gordon: We now offer in evidence the deposition of MRS. JANE E. JONES.

Judge Kennerly: That was suppressed.

Mr. Gordon: No, sir; not this one. This was taken the 20th of November, 1914.

Interrogatory No. 1:

Please state your name, age and place of residence; how long you have resided in the county where you now live, and how long you have resided in the State of Texas; and in what places in the State of Texas, and during what time. Please state what relation, if any, you are to Judge James I. Perkins?

To the 1st direct interrogatory, she answers:

My name is Mrs. Jane E. Jones, my age is 88 years. My place of residence is Garrison, Nacogdoches County, Texas. I have resided in Nacogdoches County for 19 years, and in Texas 84 years. My family came to Sabine County when I was four years of age, lived there two years then we moved to San Augustine County, Texas, living there 12 years. Then

we moved to the city of Houston in Harris County, where we lived for 8 years, then moved back to San Augustine County, Texas, living there 43 years, then moved to Nacogdoches County, Texas, where I have since resided. I am a full sister of Judge James I. Perkins.

Interrogatory No. 2:

Did you ever know, or know of, a man who went under the name of David Brown? If you say that you did, then state when and where you knew him; where did he live and where did you live with reference to said David Brown at the time you so knew him or knew of him.

To the 2nd direct interrogatory, she answers:

I knew a man by the name of David Brown. I knew him while living in San Augustine County, Texas, in the year 1840 or 1841. David Brown was a transient man and had no home that I knew of. His daughter Mary boarded with my family awhile while attending school.

Judge Kennerly: We object to the second direct interrogatory and answer thereto because it is immaterial to any issue in this case. There has been no deed or other instrument offered in evidence that shows this title came through David Brown, and for that reason the evidence is wholly immaterial, and the reputation of one through whom a title has passed is not admissible on the question of forgery.

Objection overruled.

Defendants except.

Judge Kennerly: Our objection goes to all the testimony. We make the further objection to the answer to the fourth direct interrogatory, and to the question because it does not

call for the general reputation, but his reputation as to being a forger of land titles.

Objection overruled.

Defendants except.

Judge Kennerly: We make the same objection to the fifth and answer.

Objections overruled.

Defendants except.

Interrogatory No. 3:

Were you acquainted with the general reputation of David Brown, as to his honesty and integrity, in the community in which he lived at the time he lived there? If yea, state what that reputation was, as to his honesty and integrity; was it good or bad?

To the 3rd direct interrogatory she answers:

Yes, I was acquainted with the general reputation of David Brown when I knew him as to his honesty and integrity in the community in which he lived at the time he lived there. His reputation was bad.

Interrogatory No. 4:

Do you know what the general reputation of the said David Brown was in the community in which he lived, at the time he lived there, as to his being a forger of land titles? If you say that you do know what his reputation was, then state whether it was good or bad.

To the 4th direct interrogatory, she answers:

Yes, I was acquainted with the reputation of David Brown when I knew him in the community in which he lived at the time he lived there, as to his being a forger of land titles. He was commonly known as a forger of land titles and papers.

Interrogatory No. 5:

Do you know what the general reputation of David Brown was in the community in which he lived, at the time he lived there, with reference to the acquisition of lands and the manner of their acquisition by him? If, so, state what that reputation was.

To the 5th direct interrogatory, she answers:

I do not know where he lived during all of his life, but his reputation in the community where I lived and where he operated was bad. It was commonly known that he dealt in forged land matters.

Interrogatory No. 6:

Please give the names of all the children of said David Brown, and if any of them are married, state to whom they are married. Also state whether or not the wife of the said David Brown is living or dead, and if dead, when and where did she die?

To the 6th direct interrogatory she answers:

David Brown had one child to my knowledge, a daughter named Mary, who married a man by the name of William Frazier. I never knew David Brown's wife. I understood that she had died before I knew him.

Cross Interrogatory No. 1:

Please give the exact date of your birth.

To the 1st cross interrogatory, she says:

8th day of June, 1826, is the date of my birth.

Cross Interrogatory No. 2:

Please give the exact place of your residence each year since you were eight years of age.

To the 2nd cross interrogatory she answers:

From my 6th to 18th years San Augustine County; from my 18th to 26th years, Harris County, Texas. From my 26th to 69th years, San Augustine County, Texas; from my 69th to 88th years, Nacogdoches County, Texas.

Cross Interrogatory No. 3:

Did you ever see David Brown in your life?

To the 3rd cross interrogatory, she answers:

Yes, I have seen David Brown quite a number of times in life.

Cross Interrogatory No. 4:

Is it not true that you were not personally acquainted with him?

To the 4th cross interrogatory she answers:

I was personally acquainted with David Brown. He visited my father's house while his daughter boarded with us and attended school.

Mr. Whitaker: We now offer in evidence the deposition of JOHN C. FALL, taken in Nacogdoches County:

Direct Interrogatory No. 1:

Please state your name, age and place of residence. Please state when and where you were born. State the different places that you have lived during your life, especially when and how long you have lived in Nacogdoches County.

In answer to the 1st direct interrogatory, he says:

My name is John C. Fall. My age is 73 years; and I reside in Nacogdoches, Texas. I was born in the year 1841 at Cherino in Nacogdoches County, Texas, and lived at Cherino from that time until about the year 1861. I re-

sided in Kaufman County, Texas for about three years, being 1868, '69 and '70. I have resided in Nacogdoches all the rest of my life except the three years mentioned above when I was in Kaufman County.

Direct Interrogatory No. 2:

Please state what public office, if any, you now hold, and how long you have held the same.

In answer to the 2nd direct interrogatory, he says:

I now hold the office of County Treasurer of Nacogdoches County. Have held it nearly two years.

Direct Interrogatory No. 3:

Please state whether or not you ever knew a man by the name of William Daniels or Bill Daniels, who lived in Nacogdoches County. If yea, state when, where and how long he lived in said County.

In answer to the 3rd direct interrogatory, he says:

Yes, I knew him from my childhood until the year 1861. I knew him as far back as I can remember, until 1861. He lived near Cherino. I think he died there about the beginning of the war.

Direct Interrogatory No. 4:

Please state how he was generally known and called. That is, by what name.

In answer to the 4th direct interrogatory, he says:

He was called William Daniels and Bill Daniels.

Direct Interrogatory No. 5:

Please state whether or not he was ever known as William A. Daniel.

In answer to the 5th direct interrogatory, he says:

No, he was not.

Direct Interrogatory No. 6:

State whether or not you knew of any other man who lived in or around Cherino, who was known or called William Daniels other than the one you have herein mentioned; if you have said that you knew a William Daniels who lived there.

In answer to the 6th direct interrogatory, he says:

No. I never did.

Direct Interrogatory No. 7:

State whether or not the William Daniels you speak of was an educated or an uneducated man; and whether or not he could read or write.

In answer to the 7th direct interrogatory, he says:

I don't think he was educated. I know he could not write.

Direct Interrogatory No. 8:

If you state that he could neither read nor write, then state how you know this.

In answer to the 8th direct interrogatory, he says:

Because he made a deed to me in the year 1859 for land, in which deed he signed his name by making a cross. There are other deeds on record here in which he signed his name the same way.

Direct Interrogatory No. 9:

State whether or not you ever saw any deeds or instruments of writing executed by the said William Daniels you mentioned. If yea, then state how they were signed. That is, what name was signed to them. State whether it, or they, were signed in person by the said Daniels or by his making his mark.

In answer to the 9th direct interrogatory, he says:

Yes, I have. The one I saw was signed by William Daniels by making his mark.

Direct Interrogatory No. 10:

If you have answered that you knew a man by the name of William Daniels who lived in Nacogdoches County, then state whether or not you ever knew a man by the name of William A. Daniel living in said county.

To the 10th direct interrogatory, he says:

No, I never did.

Cross Interrogatory No. 1:

It is a fact, is it not, that the name Daniel is a very common name, and that there are many people in this country and in this state by that name? It is a fact, is it not, that there have been many people in Texas heretofore by that name?

In answer to the 1st cross interrogatory, he says:

It was not a common name in Nacogdoches County in an early day. I suppose there were. I don't know.

Cross Interrogatory No. 2:

You do not mean to say that you knew all of the people by the name of Daniels, and that there were not other persons by the name of Daniels, or Daniel, in east Texas during the time that you have been testifying about?

In answer to the 2nd cross interrogatory, he says:

I do not.

Cross Interrogatory No. 3:

You do not mean to say that there was no such man as Daniel or Daniels, because you did not happen to know him, do you?

In answer to the 3rd cross interrogatory, he says:

I do not.

Cross Interrogatory No. 4:

Is it not a fact that there may have been a half dozen men by the name of Daniel, or Daniels, or by the name of William Daniel, or William A. Daniels, or Bill Daniels, along about the time inquired about, and that you did not know them?

In answer to the 4th cross interrogatory, he says:

I never knew any one by the name of Daniels or Daniel except Williams Daniels and his family, about the time inquired of.

Cross Interrogatory No. 5:

What was your business during those days?

In answer to the 5th cross interrogatory, he says:

Going to school.

Cross Interrogatory No. 6:

If you have said that the William A. Daniel, or Daniels, whom you claim to know, could not write, state fully and in detail how you know he could not write.

In answer to the 6th cross interrogatory, he says:

I never said William A. Daniel could not write. I never knew him.

Mr. Gordon offers in evidence the deposition of DOCK OWENS.

Direct Interrogatory No. 1:

Please state when and where you were born, and where you have lived all of your life.

To the 1st interrogatory, he answers:

My name is Dock Owens. I was born at Mt. Gallagher, in Laurens District (now Laurens County) on the 15th day of December, 1835, and have lived the greater portion of my life in Laurens and Greenwood Counties.

Direct Interrogatory No. 2:

State what official position you hold, if any, and how long you have held this position.

To the 2nd interrogatory, he answers:

I am coroner of Greenwood County, and have been holding that office for five years.

Direct Interrogatory No. 3:

Please state if you ever knew William A. Daniel. If so, when and where did you know him, and about what aged man was he when you knew him?

To the 3rd interrogatory, he answers:

Yes, I knew William A. Daniel. I knew him in 1845, in Laurens District (now Laurens County) South Carolina. He was then a young man who had been living in Texas, appearing to be about thirty years of age.

Cross Interrogatory No. 1:

Is the William A. Daniel, whom you claim to have known, living or dead? If living, where is he living, and if dead, when did he die and where?

To the 1st cross interrogatory, he answers:

He died somewhere in the west, about 1849 or 1850.

Cross Interrogatory No. 2:

If you say he is dead, where did he live during his lifetime?

To the 2nd cross interrogatory, he answers:

He lived in Texas, when I knew him.

Cross Interrogatory No. 3:

What sort of looking man was he? Please describe him.

To the 3rd cross interrogatory, he answers:

He was a man of fine appearance, physically, about 5 feet, 8 inches tall. He was a man of limited education but very talkative and intelligent.

Cross Interrogatory No. 4:

How long did you know him, and how intimately you know him?

To the 4th cross interrogatory, he answers:

I was quite young when he moved to Texas, and I knew him on his return, on two occasions to his old home, in Laurens County. On his return to this state from Texas he visited my father's home and, while I was quite young, I remember him vividly, and recall that he gave me presents which charmed me as a child.

Mr. Gordon: We now offer certified copy of a deed from the deed records of Nacogdoches Co. Vol. N p. 340, dated the 5th of January, 1859, signed Wm. Daniel, his mark, and recorded January 5, 1859, and made to William H. Swift and Amanda Johnson, purporting to convey a part of the Wm. Daniel headright in Van Zandt Co. It is offered on the question of identity.

Judge Kennerly: We object to that deed because it is wholly immaterial and irrelevant to any issue in the case, because, if offered for the purpose of showing that the William Daniels who is purported to have executed the deed to T. J.

Word could not write, there is no proof to show that he was the identical person who made the deed to T. J. Word. And we further object because the mere fact that if a man does not sign a deed by mark, even if he can not read and write, does not necessarily show that he did not sign the deed. A man might sign a deed by having some one else sign his name to it.

Mr. Gordon: The purpose is to show the identity of the man under whom they deraign title. It has been held that a fraudulent impersonation of another man is a forgery.

Judge Kennerly: In order to save time, we withdraw the objection.

(Deed read)

Mr. Gordon: We offer another deed from Wm. Daniel, his mark and Martha Daniel, her mark of Nacogdoches County, Texas, dated March 12, 1859, purporting to convey to Wm. L. Daniel, his son, certain land in Nacogdoches Co., and this deed was duly acknowledged before A. B. Eubank, the same Notary who took the acknowledgment to the other deed on the 1st of December, 1859, and is recorded in Book O pp. 96 and 97 of the deed records of Nacogdoches Co.

Mr. Gordon: We offer in evidence certified copy of another deed from Wm. Daniel, his mark, to H. Nelson, dated August 20, 1851, acknowledged before N. Amory, Notary Public of Nacogdoches County 22nd of August, 1851, and recorded in Van Zandt Co., Vol C p. 63, and purports to convey some land in Van Zandt Co.

Mr. Gordon: We offer another deed signed by Wm. Daniel, his mark to Albert A. Nelson, conveying an interest in his land in Van Zandt Co., reciting that it is part of the Wm.

Daniel headright, dated November 14, 1855, and acknowledged in Nacogdoches Co. before O. L. Holmes, County Clerk, on the 15th of November, 1855, and recorded in Van Zandt County, Vol. P p. 263.

Mr. Gordon offers in evidence deed from Wm. Daniels, his mark (the s being added) to Wm. A. Swift and T. Jeff Johnson, and purports to convey a part of his league in Van Zandt County, dated February 11, 1856, and acknowledged before Mr. Eubank, also on the 7th of April, 1856, and recorded in Vol. P p. 272 of Van Zandt County records.

Mr. Gordon offers in evidence another deed from Wm. Daniel, his mark to Wm. C. Daniel, another one of his sons, conveying a part of his headright in Van Zandt County Texas, dated Aug. 17, 1857 and recorded in Book G pp. 96, 97 and 98 of the Van Zandt County records.

Mr. Gordon: We offer in evidence instrument styled defeasance from T. J. Word and John Smith to Frazier and wife, signed January 19, 1855, duly acknowledged and duly recorded, being a certified copy from Tyler County from Book B p. 262.

Judge Kennerly: We have no objection to it.

"Defeance Ward and Smith to Frazer & Wife—

Sabine County Texas January 19th 1855—

On the 23rd of Feb. 1854 William B. Frazer and his wife Mary E. Frazer formerly Mary E. Brown executed a deed to one of the undersigned (Thomas J. Ward) with general warranty for the following League of land viz T. J. Harrisons headright league—the headright league of Samuel R. Fisher the headright League of Uriah Davison the headright league of Augustus C.

Reddick and the headright league of R. C. Rogers and also on this day the same parties have executed to the same a deed with general warranty for the following League of land Viz One league granted to Norman Hurd—the league granted to Henry McGill (less 926) acres and the league granted to D. C. Montgomery the league granted to Leman D. Leslie the league granted to John A. Vickers the league granted to Mark M. Bradley the league granted to Joseph Ellory The league granted to Charles A. Felder and the south half of league granted Elijah Hunter being seven whole leagues and parts of two others as described in said Last Mentioned deed and also by the same parties to the same, a deed of this date with general warranty for three other leagues of Land Viz—the League granted to R. Stone. The League granted to R. Prince and the league granted Isaack L. Stout and also a deed of this date with general warranty to both the undersigned for the league granted to Samuel Crismon and also the same parties have on this day executed to one of the undersigned (John Smith) a deed with general warranty for five leagues of land Viz The league granted to George Jamison. The league granted to S. R. Langdon. The league granted to Spencer Osborn The league granted to J. F. Middleton and the league granted to Daniel F. Edwards and it appearing upon examination of the deeds of the said Mary E. Frazer that she has only a special warranty to her it is agreed by the undersigned that the warranty contained in the several deeds above mentioned shall be held and considered as a special warranty and that the said deed shall convey to them as above described only the title which the said Mary E. Frazer and her said husband May have had in and to the said lands conveyed by the said several deeds and the undersigned Execute this Instrument as a defeasance setting forth the fact that the



8-3482

Free inhabitants in

Post office
Dwelling
houses
numbered
in the
order of
visita-
tionFamilies
numbered
in the
order of
visita-
tionThe name of
every person
whose usual
place of
abode on the
first day of
June, 1850,
was in this
family.DESCRIPTION
Age. Sex. Color-
White,
black,
or mu-
lattoProfession,
occupation,
or trade of
each male
person, over
15 years of
age.VALUE OF
ESTATE
OWNED.
Value of
real es-
tate.Place of
birth,
naming
state,
territory,
or countryMarried
within
the
yearAttended
school
within
the yearPersons
over 20
years of
age who
can not
read and
writeWhether deaf and
dumb, blind, insane,
idiotic, pauper, or
convict.

in the county of Nacogdoches State of Texas enumerated by me on the 8 day of Oct 1850

R. C. Hamil Ass't Marshal

1	2	3	4	5	6	7	8	9	10	11	12	13
18	18	William Daniels	51	M		Farmer	15,000	Tennessee				
		Martha "	40	F		Do		Do			/	
		William "	20	M		Do		Do			/	
		Randolph "	17	M				Alabama				
		Martha "	11	F				Texas		/		
		John "	4	M				Do				

said Deed are to be considered and hold as containing a Special Warranty against the grantors and those claiming under them and no others.

Witness our hands and seals 19 Jan. 1855.

T. J. WORD (SEAL)
JOHN SMITH (SEAL)"

Mr. Gordon: We now offer from the census department at Washington D. C. enumeration for the year 1850 of the family of Wm. Daniels made by H. C. Hemmell, Assistant Marshal for Nacogdoches, Texas.

"ERM
DEPARTMENT OF COMMERCE

Washington, June 15, 1914.

I HEREBY CERTIFY that the annexed is a true copy of the original returns for the Family of William Daniels, made by R. C. Hamil, Assistant Marshal, for Nacogdoches County, Texas, at the Seventh Census, 1850, on file in the Bureau of the Census.

W. L. AUSTIN
Acting Director
(Official title.)

OFFICE OF THE SECRETARY

I HEREBY CERTIFY that W. L. Austin, who signed the foregoing certificate, is now, and was at the time of signing, Acting Director of the Census, and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name and caused the seal of the Department of Commerce to be affixed this 15th day of June, one thousand nine hundred and fourteen.

(SEAL) ,

WILLIAM C. REDFIELD
Secretary of Commerce.

Mr. Gordon: We now offer from the records the enumeration of the family of Wm. Daniels made by N. J. Moore, Assistant marshal for beat No. 10 and 11, Nacogdoches County in 1860.

"ERM
DEPARTMENT OF COMMERCE

Washington, June 15, 1914.

I HEREBY CERTIFY that the annexed is a true copy of the original returns for the family of Wm. Danils, made by N. J. Moore, Assistant Marshal for Beat No. 10 L. Nacogdochs County, Texas, at the Eighth Census, 1860, on file in the Bureau of the Census.

W. L. AUSTIN
Acting Director.
(Official Title.)

OFFICE OF THE SECRETARY

I HEREBY CERTIFY that W. L. Austin, who signed the foregoing certificate, is now, and was at the time of signing, Acting Director of the Census, and that full faith and credit should be given his certification as such.

IN WITNESS WHEREOF, I have hereunto subscribed my name, and caused the seal of the Department of Commerce to be affixed this 15th day of June, one thousand nine hundred and fourteen.

(SEAL)

WILLIAM C. REDFIELD
Secretary of Commerce.

8-3482

Free inhabitants in Beat No. 10 L in the county of Nacogdochs State of Texas enumerated by me on the 9 day of Aug. 1860
Post Office Cherino

Dwelling houses numbered in the order of visitation	Families numbered in the order of visita- tion	The name of every person whose usual place of abode on the first day of June, 1860, was in this family.	DESCRIPTION Age, Sex, Color- White, black, or mu- latto.			Profession, occupation, or trade of each person, male and fe- male, over 15 years of age.	VALUE OF ESTATE OWNED. Value of real estate		Value of person- al es- tate.	Place of birth, naming state, territory, or coun- try.	Married within the year.	Attended school within the year.	N. J. Moore Persons over 20 years of age who can not read and write.	Ass't Marshal. Whether deaf and dumb, blind, in- sane, idiotic, pauper, or con- vict.
1	2	3	4	5	6	7	8	9	10	11	12	13	14	
1069	1037	Wm. Danils	59	M		Farmer	12,400	16,420		Va			1	
"	"	Martha "	49	F		House Keeper				Ten				
"	"	Elisha B "	25	M		Farmer		150		Ala				
"	"	John T "	12	M		Day Labor				Texas				
"	"	Jesse Crouson	25	M		" "				Ala				
"	"	Wm Thomas.	58	M				1,600		Ga				

W. T. CARROLL, a witness for the plaintiffs, testified as follows:

Questioned by Mr. Gordon:

Q. You live at Jasper? A. Yes, sir.

Q. You are a pumper for the Santa Fe Railroad? A. Yes, sir.

Q. Did you ever live at Fletcher in Hardin County?

A. Yes, sir.

Q. When did you first go there? A. In 1901.

Q. How long did you stay there? A. I stayed there until May, 1903.

Q. When you went to Fletcher, what did you find there in the way of houses and dwellings? A. I found a pump house is all I found.

Q. How far was it from the railroad? A. It was on the right of way.

Q. This was the pump house where you pumped water out of the creek? A. Yes, sir.

Q. You did build a house there? A. Yes, sir, I did.

Q. What time did you build the house? A. I built the house in March.

Q. March, 1901? A. Yes, sir.

Q. Is that the first house built there when you went there? A. Yes, sir; that was the first house built there.

Q. When did you last see that house? A. Last Friday.

Q. It is the same old house? A. Yes, sir; I saw it as I come by there. I never pass there without seeing it.

Q. Is it about fifty feet from the right of way? A. I never did measure it. It is just up the hill from the tank.

Q. How did you come to build that house there? A.

I had no other place to live with my family. I wanted to have shelter for my family, and the pump house was no fitten place to have them.

Q. When you went there in 1901 and built that house was there anyone else living there at all? A. No, sir.

Q. Was there anybody working the sand pit there? A. No, sir; not at that time.

Q. At that time was there any evidence of anybody having previously worked the sand pit, and, if so, how much outside the right of way, if any, did it appear to have been worked? A. The sand pit had been worked and the end of the track, I suppose, I never did measure it, was 150 feet from the track; it might have been further than that from the furthest point back to the center of the railroad track.

Q. About how much land appeared to have been utilized outside of the right of way? A. I could hardly get at it; it run down quite a ways before it left there, the sand spur, and I suppose maybe there was a half or three-quarters of an acre outside of the right of way; it run down the right of way quite a piece before it got off the right of way. The spur track turned in and went out that way in a Y shape; went a right smart piece down before it left the right of way and parallel with the track to get off the right of way; it was down an incline.

Q. Now, after you went there, did you see anybody working there at the sand pit? A. Yes, sir.

Q. How often? A. Why, I could hardly say how often; just when they would need some, they would come in and take sand out.

Q. Was there ever a time that there was nobody there

getting sand? A. Yes, sir; lots of times, nobody was there getting sand.

Q. About how long a distance between times, about how long between the times they would get sand? A. That would be right hard to say; one time for quite a while they did not get any sand, from along in March until along the latter part of August; one time they had the bridge across in there and they could not get in and get sand out of the pit at all.

Q. That was from March until August? A. Yes, sir.

Q. They had a bridge across in there? A. Yes, sir.

Q. From March until the latter part of August? A. Yes, sir; probably it might have been the 1st of September, I do not recollect, somewhere about that time.

Q. Describe what was the condition then? A. The bridge crew ran down under the incline as close up as trains could pass. I recollect that they had to block that track up; they had to keep the cars of the bridge crew from slipping down that incline, and they kept them blocked up there.

Q. When they were moving sand, what about the working of the sand pit? A. The railroad company and a man named Pittman had sand loaded there. My father worked for the railroad company and Mr. Pittman and they loaded sand with the section gang.

Q. How often was that? A. That would be a hard matter to answer that question. They come in when they wanted sand; the railroad company and Mr. Pittman would have sand loaded as he would get orders.

Q. I show you photograph No. 1, introduced by the defendants, and ask you if that is the house you built there in 1901? A. Yes, sir; that is the house.

Q. What did you do with that house when you left?

A. I just moved off and left it there. The person that relieved me went in the house.

Q. Did you sell it to anybody? A. Not at that time.

Q. Did you afterwards? A. Yes, sir; to a negro afterwards.

Q. For how much? A. Ten dollars.

Q. Was that about what it was worth? A. It was not what it cost me. I paid \$36.00 for the lumber.

CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. You went there in August, 1901? A. No, sir; the 4th of January, 1901.

Q. You stayed there until May, 1903? A. Yes, sir.

Q. By what authority were you there? A. I was employed by the G. B. & K. C. Railroad.

Q. You were living on this land while you were in the employ of the G. B. & K. C.? A. Yes, sir.

Q. Running the pump for that railroad? A. Yes, sir.

Q. About how far was the house you lived in from the pump? A. I suppose it would measure 200 or 250 yards from the pump station.

Q. The house you lived in is now where it was then? A. Yes, sir.

Q. You were told by the railroad company not to put your house on the right of way, were you not? A. No, sir; I was not told that.

Q. Do you deny that the roadmaster of the G. B. & K. C. Railroad told you not to place that house on the railroad right of way, but to put it on the outside? A. Mr. Turner, the roadmaster, told me to build a house there to live in.

Q. He gave you permission to build the house? A. Yes, sir.

Q. Didn't he tell you not to build it on the right of way? A. No, sir.

Q. Then if your father testified that he heard the road-master tell you not to build the house on the right of way, would you say that is not correct? A. I am not responsible for anything anybody says but myself.

Q. You answer that you were not told by the road-master not to build the house on the right of way? A. No, sir.

Q. You could not be mistaken about that? A. No, sir.

Q. That he did not tell you that at any time? A. No, sir; he did not.

Q. Where did you go after you left there in May, 1903? A. I went to Jasper.

Q. One of the agents of the Texas Pine Land Ass'n., no, I believe Mr. Danziger of the Texas Supply Co., has testified that in March, 1902, he was prevented by the condition of the track from taking out any sand, March, 1904, I think it was; that is the time the track was out of order? A. No, sir; it is not.

Q. Do you remember that it was out of order in March, 1904? A. No, sir.

Q. You don't remember anything about that? A. No, sir; I do not.

Q. Just describe exactly how that track was situated at the time you say that from March until August or September they could not take any sand out of there? A. They were keeping bridge cars there, that is the camp cars they

carried the bridge gang in. They were put in there to renew the bridge they built, the trestle, a new trestle instead of the old one.

Q. The G. B. & K. C. track got out of order? A. Yes, sir.

Q. And they put a lot of cars on that side track with a lot of people living in them to repair the track? A. Yes, sir.

Q. Then it was during this time that the bridge gang of the G. B. & K. C. was on there? A. Yes, sir.

Q. What were they working at there? A. Building bridges.

Q. Where were they? A. On the sand track spur. Of course they did not do any work on the sand track.

Q. Who gave them permission to use that track to live on during that time? A. I suppose the railroad put them there, I don't know.

Q. You are not prepared to say? A. No, sir.

Q. You don't know but that they got permission from the Pine Land Ass'n.? A. No, sir.

Q. Or the Houston Oil Co.? A. No, sir; I could not say.

Q. Are you swearing that during that period, March 1st to September 1st, that there was not a single, solitary car taken out of that pit there? A. I can not say as to the latter part of August or the first of September, one or the other.

Q. There was none taken out of there from March 1, to the latter part of August or the 1st of September, 1901; do you swear that not a single car of sand was taken out of there? A. No, sir; they could not take it out.

Q. What do you swear about it? A. Yes, sir; I swear they did not.

Q. You swear that there was not a single car of sand taken out during that time? A. I will swear that clearly.

Q. You are sure of that? A. Yes, sir.

Q. You speak of the sand pit near the water tank? A. Yes, sir.

Q. You are not talking about this sand pit up here? A. No, sir.

Q. You don't swear that they did not take sand out of there during that time? A. Yes, sir; they might have got a little there.

Q. What are you swearing about? A. The big sand pit up here.

Q. You did not mean this one up here? A. No, sir.

Q. There might have been any amount of sand taken out of there and you not know anything about it? A. Yes, sir; I would know about it. I would not say that they did not take sand out there, but the other place was blocked up.

Q. Where did the folks there do their washing? A. They did it around the tank there.

Q. Did they do it there in Village Creek? A. Yes, sir; and around the tank, and some of the men folks did their own washing.

Q. Where would the men be on Sundays? A. Some of them would go to Beaumont, and some of them would go fishing and some frog hunting. They would be scattered out.

Q. During the time these men were there did any of them have horses that they would ride out over the country? A. No, sir.

Q. They had hand cars to run into Silsbee on? A. Yes, sir, and come to Beaumont on the hand car, I guess. I am not sure of that, but I know we all went to Silsbee on the hand car one night and got our pay. It was pay day and we went up there for our money.

Q. Did not some of them have some chickens around there? A. No, sir.

Q. There were families? A. Yes, sir.

Q. Where were you living? A. In the little house I saw the photograph of.

Q. During that time you were living in the house you see in the photograph? A. Yes, sir.

Q. While the cars were there you were in this house living with your family? A. Yes, sir.

Q. You ate and slept there? A. Yes, sir.

Q. You were there all the time? A. Yes, sir.

Q. And your wife was there all the time? A. Yes, sir.

Q. Did you have any children? A. Yes, sir.

Q. Did you have any little patch or garden? A. No, sir, we made a brush pen and planted a mustard patch, but it didn't do any good.

Q. You had chickens, did you? A. Yes, sir, we had chickens.

Q. Did you have a cow? A. I got a cow from Mr. Cook; I didn't own the cow; I got her for her feed from Mr. Cook.

Q. You kept a cow there? A. Yes, sir.

Q. Did you have a house for her? A. No, sir, no house for the cow.

Q. Did you have a house for the chickens? A. Yes, sir.

Q. Did you have a horse and buggy? A. No, sir.

Q. You had no horse? A. No, sir.

Q. As soon as the bridge gang left they began taking sand from that pit again? A. Yes, sir.

Q. You say this sand track was about 150 feet from the main line to the end of the track? A. Yes, sir, about that far; I could not give a definite answer; I don't know exactly.

Q. You said there was about a half or three-quarters of an acre there, but you did not measure how much? A. Yes, sir, I was guessing at it; I said I supposed.

Q. You did not put the compass on it, as Mr. Bumpstead said, and measure it? A. No, sir, I did not.

Q. You were there until 1903? A. Yes, sir.

Q. For a part of that time at least Mr. Danzinger for the Texas Builders Supply Company was taking sand out?

A. Yes, sir, part of the time.

Q. You don't deny the sand being taken out of there as Mr. Danzinger reported to the Houston Oil Co.? A. No, sir.

Q. You don't deny that he got sand out of there? A. I don't know what he did; I know Mr. Danzinger took sand away from there.

Q. Had you ever been about that place before you went there to live; where were you working before you went there?

A. At a little mill called Funston Mill that belonged to Mr. Aldridge.

Q. What county is that in? A. Jefferson County up on the Santa Fe.

Q. You said no one was there when you moved there?

A. I relieved a pumper there; I relieved a man at the pump house; there was nobody living at the sand pit.

Q. Was Sim Collins there? A. He came there after Mr. Pittman went to loading sand.

Q. Do you swear that Sim Collins was not there as early as 1901? A. He came there after the bridge crews got out; Mr. Pittman leased the sand pit, he and my father together and they ran the sand pit, and they sent Sim Collins there to load the sand.

Q. Your father ran the sand pit? A. Yes, sir, he was Mr. Pittman's agent, I suppose.

Q. Who did Mr. Pittman lease the sand pit from? A. I don't know, sir.

Q. Don't you know it was from the Texas Pine Land Ass'n or the Houston Oil Co.? A. No, sir, I do not. My impression was that the sand pit belonged to the Santa Fe Railroad; that was what I thought, I did not know.

RE-DIRECT EXAMINATION.

Questioned by Mr. Gordon:

Q. You were not there as the tenant of the Houston Oil Company or the Texas Pine Land Ass'n were you?

Judge Kennerly: That would be the conclusion of the witness. The testimony is that the GB&KC was there by permission of the Texas Pine Land Ass'n.

The Court: Yes, sir, that would be a conclusion.

Q. Did you have anything to do with the Texas Pine Land Ass'n or the Houston Oil Co. about your staying there?

A. No, sir.

Q. Not a thing? A. No, sir.

Q. You did not know the difference between the GB& KC Railroad and the Santa Fe Railroad, or when one became the other? A. No, sir, I did not know at that time they had changed, but I know now.

ELIAS K. WARD, witness for the plaintiffs and interveners, testified as follows:

Questioned by Mr. Gordon:

Q. How old are you, Mr. Ward? A. I am 58 now.

Q. You were subpoenaed in this case by the Houston Oil Co.? A. Yes, sir.

Q. Do you know why they didn't put you on the stand? A. No, sir, I don't.

Q. How long have you known the Felder survey of land? A. All my life.

Q. Were you born up there? A. Yes, sir, on the Leslie league just above it.

Q. In some testimony taken once before the statement was made by you according to that record that the sand on the Felder was about a mile long; what did you mean by that expression? A. Well, the sand pit was not that long. It is a sandy piney country. It is a sandy place on the Felder league. It is sand and dirt.

Q. Sandy soil? A. Yes, sir.

Q. Did you mean to say that the sand pit at Felder extended that far? A. No, sir.

Q. How much did the sand pit at Felder amount to in acres?

Judge Kennerly: We object because the contracts speak for themselves, and they can not offer evidence to vary those

contracts; the parties having contracted, they would not be permitted to vary from that.

The Court: I don't think the witness could give evidence varying from the contracts; if he did, I would exclude it. If the testimony of the witness is to show how much is contained in the contract, and the contract itself is silent, I would admit the testimony.

Questioned by Judge Kennerly:

Q. Do you know anything about what was in the minds of the parties to these contracts at the time they made them?

A. No, sir, I don't know.

Q. You don't know what they meant by Sand Pit F?

A. Yes, sir, I knew.

Q. Do you know what the parties meant when they put in this written contract Sand Pit F; do you know what was in their minds at that time? A. No, sir, I do not.

Q. You don't know what they were talking about? A. Yes, sir, it was in their minds to haul sand off for such things as they needed it for.

Q. You don't know what they had in their minds when they said Sand Pit F? A. No, sir, I did not then.

Judge Kennerly: We object because the witness had no idea what they meant and is not competent to testify of his own knowledge.

Objection overruled.

Defendants except.

The Witness: I did not know what the contract was then.

Questioned by Mr. Gordon:

Q. Do you know where Sand Pit F is at Fletcher? A. Yes, sir, I certainly do.

Judge Kennerly: We make the same objections.

Objections overruled.

Defendants except.

Q. How many acres are there that has been excavated and that sand covers?

Judge Kennerly: That appears on p. 544.

Q. How many acres does that cover, the sand that has been taken out and the sand that is still there?

Mr. Lee: The witness has not stated that he knew where Sand Pit F was; the witness has qualified his answer, and said he knew where the sand pit at Fletcher was.

Objections overruled.

Defendants except.

Q. There is only one sand pit there at Fletcher? A. No, sir.

Q. Now, how many acres does that embrace, including what has been excavated and what has not been excavated?

Judge Kennerly: We object to all that testimony.

The Witness: I judge about eight acres, somewhere along there; seven or eight acres, I don't know exactly, that lies immediately west of the railroad track.

Q. Where does that seven or eight acres lie? A. West of the railroad track; that is, west and south of it.

Q. What is the sand bounded by to the west and south?
A. By the creek and the railroad and pond on the north side.

Q. That is the place where the sand pit is? A. Yes, sir, that is the sand pit at Fletcher.

Q. So when you testified according to the statement in the record about the sand being a mile wide or a mile long on the league, you meant what? A. I meant the whole league, the place where the sandy, piney woods was; lots of it is dirt and sand and it is not fit for anything. Lots of the east of it is hammock and portions of it piney woods and brush.

Q. How about farming land on it? A. There is some good farming land on it.

Q. Farming land, good farming land? A. Yes, sir.

Q. How does that compare with all that section of the country? A. It is a little more sandy than the other; the further north you go the more dirt and clay you find until you get to Village Creek again, and there is another sand pit on the Santa Fe Railroad.

Q. Do you know when Mr. Carroll went there and built a house? A. Yes, sir.

Q. What year was that? A. I don't know exactly the year; I think it was in 1901. The first house that was built there was the pump house. Mr. Aldridge had a tent for his section crew. I have been there several times myself; that was the first house put up there; the tent was on the east side of the railroad at that time.

Q. Where was the pump house? A. Right on the top of the bank of the creek, right on the right-of-way. It was just a little ways from the railroad to the pump house, ten or twelve feet from the track.

Q. Outside of that pump house right on the railroad, was there ever any house there until Mr. Carroll built his

about 1901? A. There was a little bit of a shack over there where they went in out of the rain for about a month or so, about a month I think, and that was all except Aldridge's tent, and he moved out.

Q. How long did the Aldridge tent stay there? A. I suppose a couple of months, and then this shed was there about a month; it was built of tie slabs.

Q. It was a kind of shed? A. Yes, sir, I think a negro built it.

Q. Outside of that, was there ever any house there until Mr. Carroll built his house in 1901? A. No, sir, not outside of the pump house.

Q. Were you acquainted with this sand pit and the operations conducted there? A. Yes, sir, as I stated before during the time I worked there I was. As the railroad went I went with it with the wood business until I got to Silsbee. During the time I worked there getting out switch ties and putting wood on I knew what was going on. I did not work there over a month, but I was there off and on all the time practically all my life. I have been familiar with that sand hill as far back as I can recollect.

Q. Do you know when Mr. Danziger went there in 1901, the Texas Builders Supply Co.? A. Yes, sir.

Q. Prior to that time how much of that sand along that railroad track on the west side of the railroad in area had been excavated and taken away? A. I don't have the slightest idea how much was taken away. I have seen sand cars loaded there.

Q. I mean how big a space, a half acre or five acres or what in area? A. Not over a half acre in 1892.

Q. You mean 1902? A. Yes, sir, 1902.

Q. Up to that time about a half acre outside of the right-of-way? A. I don't know any outside of the right-of-way at that time. There was a track that went parallel with the railroad, and then they would move and move it, and later on they built another switch.

Q. Did you ever notice until Mr. Danzinger went there in 1902 whether or not there was ever any cessation in moving sand out of that place? A. I don't know about that.

Q. I mean by that was it going on all the time or just occasionally? A. It was not going on all the time.

Q. Do you know whether it was going on all the time? A. I know it was not going on all the time; when they needed sand they would come and get it and be gone.

Q. How long at a time? A. May be for two or three weeks they would not load sand. I helped load it myself. I helped old man Kimball load the first sand up there, loaded it on logging cars that he pulled out right by the side of the track up on the west side; there was none on the east side there. After Kimball left there I went further up, and I don't remember when they loaded. They finally got the sand shovel in there.

Q. How long did they keep the sand shovel in there? A. I don't know how long.

Q. What year was that? A. I don't recollect what year. I think they had the sand shovel there in 1905 or 1906.

Q. What time of the year did they put the sand shovel in there? A. I don't remember what time; it seems like in the fall.

Q. You don't know how long they kept it in there? A. No, sir; I don't know how long they kept it in there; some-

times I would go there and it would be there and sometimes it would not; I don't know how long.

Q. How close was that to the right of way at that time?

A. Right at the right of way.

Q. Right at the edge of the right of way? A. I don't know how wide the right of way was; it was close up, two car lengths or three maybe.

Q. Now, can you give the jury an idea about how often they would go in there and get sand until 1902 when Danzinger commenced? A. Well, I don't know; I could not tell how often, but there would be quite a while that they would not come at all for sand. I have been there many times and there would be nobody there, and I have been there when they would be there. I have been there and there would be nobody on the place at all.

Q. Up to the time Mr. Carroll went there did anybody ever stay there steadily? A. No, sir; not regularly; they never stayed there at night at all unless it was the man that run the pump and he slept in the pump house.

Q. You spoke in your testimony formerly about a tie camp being on the Felder; have you or not verified the fact as to the location of that tie camp? A. Yes, sir; since that time I have seen the camp. I helped carry the chain with Mr. W. O. Banks over the line that I once helped Doucette carry the chain over; I was mistaken about where the line ran until Mr. Banks went there. At the time I spoke about it, I was mistaken. John Smith was the man that built the camp; we were there getting out switch ties for a son of Word, and it was just north of the Felder line. I thought before that it was on the Felder, but it was on the Mont-

gomery. We got the ties from Massey Lake. I was mistaken about the place where the camp was located.

Q. You have found that the camp was on the Montgomery instead of the Felder? A. Yes, sir; I found I was mistaken about it.

Q. Do you know when any timber was cut off the Felder league by the Texas Pine Land Ass'n? A. No, sir; I don't know that I do know of a particular place; there has been some cut, but I don't know how much; this is the fourth time I have been in this case.

Q. When was the timber cut by the Texas Pine Land Ass'n if you know that they ever cut any on it? A. I don't think the Texas Pine Land Ass'n cut any off of it; they located the first camp on the Montgomery.

Q. Did the Houston Oil Co. ever cut any timber off this land that you know of? A. I don't know.

Q. You know of some timber cut from the west end of the league? A. Yes, sir; some ties cut from the west end.

Q. Do you know about McClurg cutting timber in there? A. No, sir; I don't.

CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. What Banks did you go over the line with? A. W. O. Banks.

Q. Don't you know that happened six years ago when you went over there with W. O. Banks; when did you go there with Banks? A. I don't remember.

Q. Don't you know it was six years ago? A. Yes, sir; I guess it was.

Q. Six years ago? A. Yes, sir.

Q. You testified in this case two years ago? A. Yes, sir. I had not located the camp at that time. I have been to the camp since then.

Q. Who was with you when you located the camp? A. The old camp is there yet.

Q. Who was with you when you located the camp? A. John Smith.

Q. Did he help you locate it? A. He is the man that put it there.

Q. When did you make up your mind that you were mistaken about your testimony two years ago? A. About a year and a half ago.

Q. How came you to do it? A. I was hunting at Massey Lake.

Q. Who was with you? A. My boy.

Q. John Smith built the camp? A. Yes, sir.

Q. Where does he live? A. I don't know.

Q. Have you seen or heard of him since? A. No, sir.

Q. You found a year and a half ago that you were mistaken about where you had said the camp was? A. Yes, sir.

Q. What other part of your testimony given two years ago do you want to change? A. I don't want to change any of it; since that time I have become acquainted with it.

Q. You were here when your testimony was read yesterday and heard it? A. Yes, sir; part of what was read. There was some of it I was mistaken about.

Q. Tell the jury what part of it you were mistaken about? A. About where the league line was and about the ties they got out.

Q. You were mistaken about where the camp was? A. Yes, sir.

Q. In what other respect were you mistaken? A. I don't know; I don't want to tell anything wrong.

Q. I don't want you to. Is there anything about the testimony given by you on the former trial that you heard read yesterday, anything else except about the tie camp that you want to correct or change? A. There is one thing I would like to correct. The location of the Felder league line.

Q. You stand on your testimony that you heard read yesterday except as to the location of the Felder league line and the tie camp? A. Yes, sir; I was mistaken.

Q. Is that the only matter you were mistaken about? A. I don't call to memory anything else; I would say the same thing today.

Q. You were talking about the sand pit being seven or eight acres. You don't mean to say that you know anything about what the GB&KC had in mind when they rented that sand pit from the Texas Pine Land Ass'n? A. I suppose to get the sand.

Q. You don't know their contract? A. No, sir.

Q. You don't pretend to say? A. No, sir.

Q. You don't know anything about what the contract was between Pittman and those folks, do you? A. No, sir; I don't know Mr. Pittman, I don't know him at all.

Q. You don't know anything about the contract between the Builders Supply Co. and the Houston Oil Company? A. No, sir.

Q. Did you ever see the contracts? A. I might have seen them.

Q. Your statement about the sand pit being seven or

eight acres is your idea of it? A. Yes, sir; not over eight acres I don't think.

Q. Are you swearing that there was no sand taken except what was taken off the right of way? A. No, sir. The first that Kimball loaded was the first that I had anything to do with. He loaded at the north end.

Q. I will ask you about this shown in red on plat A; you are not swearing that was not taken out of there? A. No, sir.

Q. That is an excavation two or three hundred yards beyond Fletcher station? A. Yes, sir.

Q. Are you swearing or not that sand was not taken out of this place marked red two or three hundred yards from Fletcher station? A. I don't know that I know anything about that excavation.

Q. You don't know anything about this pit here? A. No, sir; not in that form; I know where the sand pit is, but how far they took sand out of it I don't know about that part of it.

Q. You said awhile ago that you did not know anything about timber being cut by the Texas Pine Land Ass'n; they may have cut a good deal of timber and you not know it? A. If they did it was scattered.

Q. Are you swearing now positively that there was no timber cut on the Charles A. Felder League in Hardin County by the Texas Pine Land Ass'n? A. I don't remember that there was.

Q. Do you swear positive that none was cut at any time by the Texas Pine Land Ass'n? A. They might have cut an axe handle.

Q. Don't you know that the Reliance Lumber Company

cut timber under contract with the Texas Pine Land Ass'n off the Felder? A. I don't think they did.

Q. Did you hear Capt. McNeeley's testimony? A. Yes, sir.

Q. You swear that is not true? A. No, sir; they never cut any timber off the Felder.

Q. You say that the Reliance Lumber Co. did not cut any timber off the Felder under contract with the Texas Pine Land Ass'n; you swear that? A. Yes, sir. I was the Reliance Lumber Co.'s agent for ten years, and kept tab on anything they cut there.

RE-DIRECT EXAMINATION.

Questioned by Mr. Gordon:

Q. Having been right near the league all your life, and having been the agent of the Reliance Lumber Co. you would know whether they cut timber on it? A. They never cut anything except a little patch on the Alfred Ellis that I know anything about; they cut about 100 acres.

Q. Do you know of any timber being cut on the Felder, any floating timber? A. They cut off the Felder since I was a child and floated it down the creek. The first logs I cut I chopped with an axe in my shirt tail off the Charles A. Felder. Ever since I can remember they have cut logs off the Felder, but not regularly. I have cut there myself. Frank Womack had a camp there then; he cut all the timber there was then.

Q. Was he there under the Texas Pine Land Ass'n or any of that crowd? A. No, sir; I worked there with Womack and Word Bros.

Q. I will ask you whether or not Womack was under

the railroad or any of those people? A. No, sir; he was there for himself; he said he bought 640 acres.

Q. Judge Kennerly asked you if there was anything else you wanted to correct in your former testimony. Where you stated 1891 in your former testimony you mean 1901? A. Yes, sir.

Q. Do you want to correct that? A. Yes, sir.

Q. Do you remember everything in that book there that he read yesterday? A. No, sir; I have been questioned so much I don't remember all the statements.

Q. What you are correcting now is such of the matters as have been called to your attention? A. Yes, sir; and things I have renewed my memory on I am more interested now in getting back on the four o'clock train.

Q. Have you any interest in this case? A. None whatever.

RE-CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. Don't you know that the Texas Pine Land Ass'n sued Womack and got a judgment against him? A. Yes, sir; I do.

TOM PATILLO, witness for the plaintiffs and interveners, testified as follows:

Questioned by Mr. Gordon:

Q. Where do you live? A. Between Lumberton and Fletcher.

Q. How near to Fletcher? A. I judge about a half mile.

Q. How long have you lived there? A. Well, I have

been around there about three years lately; that has been my home about 25 years; that is where I married there in about 150 yards of where I am living now. I have been right there off and on for 25 years.

Q. Do you know when the Texas Builders Supply Co. in 1902 commenced to take sand out of that pit? A. Well, I think I know; Bumpstead was building a house and said he was building it for Danzinger; I don't remember what year it was.

Q. That was the house that Mr. Danzinger built? A. Yes, sir.

Q. Prior to that time do you know when Mr. Carroll built a house there? A. No, sir; I don't know when Mr. Carroll built it. I think I was there when Mr. Carroll was working on the house and he stayed there in it, but I don't know when it was.

Q. How long had you known that pit before that time? A. Well, I have known the sand hill 25 years.

Q. Now, up to the time Mr. Danzinger commenced to take sand out of there in 1902, I will ask you how much sand in acreage had been taken altogether by any and everybody out of there previous to that time? A. I think about three and half acres.

Q. I do not ask what was taken out since that time. I am speaking about what was taken out up to twelve years ago, how much sand had been taken out prior to that time, prior to 12 years ago? A. It was very small before Mr. Danzinger built that house; I would not think over $\frac{3}{4}$ of an acre, less than an acre of sand taken out.

Q. Where was that in reference to the railroad track or right of way? A. It was just a spur that ran off from the

track at an incline outside of the right of way. There was room to put in six cars as well as I remember, and some of them would be on the right of way. That was taken out right along the right of way in the right of way and outside too.

Q. Describe the situation and tell how it was taken out in reference to the railroad right of way? A. Just like they run out from the side of the main line with an angle, and run out into the pit, and work against the bank and as they would take out the sand they would push the siding over, and they could put about six cars in there. That is about as near as I can tell. Some of the cars would be on the right of way and some of them away from the right of way, and at the place where they run the track up the right of way about two hundred yards, I don't know how much, but there must have been an acre and a half of that.

Q. Was that on or off the right of way? A. On the right of way.

Q. Now, then, on the right of way there had been a half to three-quarters of an acre? A. Yes, sir; something like that, something under an acre taken out up to 12 years ago.

Q. How often would they get sand there? A. Well, they would get orders and sometimes they would work in there pretty regularly for a week. Sometimes they would get one car or two cars, and sometimes four or five cars.

Q. The year prior to the time Mr. Danzinger came there about how long a space of time would elapse between the taking of the sand, say from the time the road was built until Mr. Danzinger came there? A. It was not considered much of a sand pit. The railroad had three little spurs I

think inside of the right of way. A good deal of the sand was gotten on the right of way before Mr. Danzinger took it for a sand pit. They got sand there just occasionally. Sometimes they would work steady for a week.

Q. Did anybody live there before Mr. Carroll went there? A. Old man Purley lived in the pump house.

Q. Were there any houses there before Mr. Carroll built that one in 1901? A. No, sir.

Q. Did anybody live there except Mr. Purley living in the pump house prior to the time the house was built by Carroll? A. Well, sometimes they would camp up and down the railroad, wood cutters and first one thing and then another and such as that, little old shanties where they would stay a month or so or something like that.

Q. How big is the sand pit there including what has been taken out and what has not been taken out, I am talking about the hill of sand there; how much of that sand is there that has been excavated and not excavated altogether?

Judge Kennerly: We make the same objection to that as to the testimony of the other witness.

Objection overruled.

Defendants except.

The Witness: I suppose eight or nine acres would cover it.

Q. Which side of the track was that on? A. On the west side of the track, that is west and south, we speak of it as west of the track.

Q. Do you know of any timber within the last 25 years being cut from the Felder league by the Texas Pine Land Ass'n. or the Houston Oil Co. or the Kirby Lumber Co.? A. No, sir, I do not.

Q. Have they cut any? A. If they did, I have never seen it. I saw some piling, some that Chance cut, is all I saw cut on the Felder.

Q. I will ask you whether that timber in there appears to be virgin timber, never cut until the last year or two? A. It has been cut for the last 25 years with the exception of someone getting over the line in one or two places and making a few pine ties; they are there yet some of them on the ground, and then a few white oak ties made, and with the exception of that there has been no timber cut except trees cut on the creek years and years ago.

Q. That was float timber? A. Yes, sir.

Q. Now, do you know anything about who lived on the west end of the league? A. Yes, sir; I know who lived there.

Q. Tell the jury about it, who lived there? A. Old man Joe Bumpstead lived there and Henry Bumpstead lives on it and I think old man Ben Walton is on it and Sam Hooks. If Walton is not on it, he is close to it.

Q. How long have those people lived there? A. The Bumpsteads were born and raised there. Sam Hooks has had someone on his place for years and old man Chance has lived there a long time.

Q. Have the McClurg boys a little saw mill this side of Village Creek? A. Yes, sir; a little one horse sawmill. I think they worked on the Chance track three years, and then bought from Sam Hooks and worked two years, making five years.

Q. When did they stop? A. About a year ago, somewhere long there.

CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. You know, of course, that the Bumpstead original survey was located in conflict with a part of the Felder don't you? A. I don't know that I do.

Mr. Gordon: We object unless he shows that he knows. The survey itself would be the best evidence.

The Court: If he knows of the fact, he could answer the question.

Q. You know as a fact that the Bumpstead original survey was located partially in conflict with the Felder survey, don't you? A. I expect the Bumpstead lies on the Felder, I don't know.

Q. Are the other tracts you have been talking about on the Felder? A. Yes, sir; I suppose so. I am not positive about the others lying on the Felder.

Q. You know that the Lancaster survey is in conflict and lies on the Felder? A. Yes, sir; I have been told that.

Q. You understand that those smaller surveys were located in conflict with the west end of the Felder, and that these people as owners of the surveys have lived there many years? A. Yes, sir; all their lives.

Q. You don't mean to say that any of these people live north and east of the creek, do you? A. No, sir.

Q. They never lived north and east of Village Creek? A. No, sir.

Q. Where were you in 1893? A. I was cutting right of way the year the road was built through there.

Q. In 1893 you cut the right of way for the G. B. & K. C. Railroad? A. Yes, sir, that is the year. I am not sure that is the year.

Q. Where were you and what were you doing in 1893?

A. I suppose I was working for the Hooks Lumber Co.

Q. Where is that situated? A. On the T. & N. O. Railroad.

Q. How far from the Felder league? A. About two miles and a half.

Q. How often were you down there in 1893? A. Well, I don't know; I suppose once a week; it was a great fishing and swimming place there.

Q. What was being done at the sand pit at that time?

A. Not a great deal. Along in the -----

Q. Did I ask you that? What were they doing at the sand pit in 1893, if anything? A. They worked there some.

Q. What do you mean by some? A. That is the year the road went through there.

Q. Taking sand out of there? A. Yes, sir; they were taking sand out of there.

Q. They were taking sand out of that sand pit in 1893? A. I don't remember the dates, I tell you. If that is the year that the road went through there they took sand out of there along the right of way when it first went through.

Q. Do you swear that they did not take any sand except on the right of way in 1893? A. Lots of places they would get over a little.

Q. About two inches? A. No, sir; sometimes 10 feet.

Q. You swear that in 1893 they did not get over ten feet outside of the right of way? A. No, sir.

Q. Would you swear that they did not get over fifty feet outside of the right of way in 1893? A. No, sir.

Q. Or 100 feet? A. Yes, sir; I would say that.

Q. Now, you say you were there once a week. Is it

not a fact that they were working there every time you remember? A. I don't know the man's name that got sand out.

Q. Is it not a fact that every time you were there in 1893 they were getting sand out of that sand pit? A. I have seen lots of times in 1893—I don't remember the days and years, I don't remember.

Q. You were working at the Hooks mill were you not? A. Yes, sir; part of the time and part of the time fishing and hunting.

Q. How many times were you there in 1893 when the sand pit was not operated? A. I was there in 1892-----

Q. I asked you about '93. A. If the sand pit was running I was there in 1893.

Q. How many times in 1893 did you see the sand pit when not in operation? A. I don't know.

Q. You don't remember anything about it? A. No, sir; only I would see it.

Q. Would they have the ties taken up and the rails carried off? A. No, sir; they would not have the rails carried off. Sometimes there would be cars standing there and sometimes they would have bridge timbers on cars standing in there, and sometimes cars with sand and sometimes empty cars.

Q. Would you ever find sand cars in there ready to be loaded? A. Yes, sir; I have seen it that way, and I have seen boarding cars in there.

Q. Sometimes when you would be there they would be loading sand? A. Yes, sir.

Q. In 1894 where were you? A. I was around there.

Q. What were you doing? A. Working for the Hooks Lumber Co.

Q. You worked for them in 1894? A. Yes, sir.

Q. How many times did you see the sand pit not in operation in 1894? A. I don't remember how many days I seen it running.

Q. Do you swear that a single time in 1894 you saw it not in operation? A. I don't remember how many times I seen it.

Q. When you saw it in 1893, there would be some cars in there loaded and some not loaded? A. Yes, sir; and I have seen it when nothing was on the spur.

Q. How far beyond the right of way had they gone with the spur in 1894? A. I judge the distance would be room for about four thirty or thirty-two foot cars. They could put that many outside of the right of way maybe.

Q. What do you mean by the right of way? A. Fifty feet from the track.

Q. They would not leave cars standing on the right of way? A. They would leave the main line clear.

Q. Did you ever know of that place not being operated for as long as two weeks in 1894? A. I don't remember the year, but I seen it more than two months not operated.

Q. Do you swear that was in 1893 or 1894? A. I would not swear the year; I don't remember the year.

Q. How many times did you see it more than two months not in operation? A. I don't remember, three or four times or maybe more.

Q. What year was that? A. I don't remember what year.

Q. What year was that? A. I don't remember the year. I can not remember the days nor the year. I would pass and not see them working, but I could not tell the time it was.

Q. It was after Danzinger went in there was it not, that you saw it vacant for as much as two months? A. No, sir; Bumpstead said he was building a house for Danzinger.

Q. That house was built in 1906; how long before that house was built did you see the property not being operated? A. Well, they began to operate it more after the house was built than they did before.

Q. Can you give the court and jury an idea of when it was that you say it was not being operated for as much as two months? A. I have seen it two or three or four times.

Q. (last question read to the witness). When the road was first built. A. Between that time and the time Bumpstead was building the house for Danzinger.

Q. Where were you working in 1895? A. I was with the Hooks Lumber Company.

Q. Where were you in 1896? A. I was there.

Q. Where in 1897? A. I have been right around there from the time the road was built until now.

Q. Where were you in 1898? A. I suppose right around there.

Q. I did not ask you for supposition. A. I don't remember the years.

Q. Where were you in 1899? A. I could not tell you.

Q. In 1900? A. I was up there around the woods some place or other. I loaded piling for McMahan & Co. at Hooks switch.

Q. Is that the Ben Hooks Lumber Co.? A. I think Sam and Tom and maybe Ben too.

Q. Mr. Ben Hooks has a company? A. Yes, sir.

Q. You are working for Mr. Ben Hooks' Company now? A. No, sir.

Q. You have been? A. No, sir; I worked there a couple or three months, when they first started.

Q. Where were you in 1901? A. Is that the year the road was built?

Q. No, sir; it was built in 1893. A. In 1891 I was working at Hooks switch.

Q. I speak of 1901, where were you that year right after the Galveston storm? A. I was at Voth.

Q. Do you remember when Mr. Carroll lived there? A. Yes, sir, I do.

Q. Have you seen that place vacant as much as two months since Carroll lived there that they were not loading sand for that length of time? A. I don't remember hardly, but I have seen it vacant passing there and nothing doing and no crew there.

Q. Could you tell whether there had been anyone there one day or two weeks before that? A. I would be there sometimes for a week, go over to my father-in-law's, and I would not see anything there for a week.

Q. Would you go there to see it every morning? A. Yes, sir; around there fishing.

Q. Do you swear that you saw every acre I mean every car of sand that was taken out of there? A. No, sir; I never saw every car that went out of there.

Q. Lots of cars you did not see? A. Yes, sir.

Q. Is it not a fact that in 1902 after Mr. Danzinger

went there was the first time you saw it closed down? A. I saw it shut down before he got there.

Q. How many times? A. Three or four times.

Q. Can you give any idea when that was? A. No, sir; I can't give the dates; I remember being there and seeing it shut down.

Q. Don't you know that away back when that sand pit first opened up Mr. Fortelberry built a house there? A. No, sir; he did not.

Q. You swear he did not? A. Yes, sir; I am positively sure he did not.

Q. Do you swear that as positively as anything else you have sworn to? A. I swear he did not because there were no houses there.

Q. There were no shacks at all there? A. No, sir; no houses there.

N. B. SCOTT, a witness for the plaintiffs and interveners, testified as follows:

Questioned by Mr. Gordon:

Q. You were summoned here by the Houston Oil Co.?

A. Yes, sir.

Q. Do you know why they did not put you on the stand? A. No, sir; I do not.

Q. You don't know why? A. No, sir.

Q. You heard them read your testimony? A. Yes, sir.

Q. In that testimony the statement was made that there was a house there about fifty feet from the railroad track which was called the Carroll house, and you were credited with saying that house was there in 1891 or 1892; is that correct? A. That is not correct.

Q. When was that Carroll house built? A. I could not tell you when that was built; I know about when.

Q. About when was it? A. About 1901 or 1902.

Q. I will ask you whether or not any house was built there, except a tent that Mr. Fortelberry had there, before that house was built by Carroll? A. I am not sure; I was not there very often; I would pass by.

Q. Their house was there? A. Yes, sir; the pump house was there, and it seems to me as well as I remember that there was a shack there about the sand pit; it seemed to be off to one side quite a ways on the sand hill. There was a shack there of some kind; it may have been a shed to get out of the rain, before the Carroll house was built.

Q. Did anybody ever live there? A. I don't think so.

Q. Did anybody live there before Mr. Carroll went there? A. Mr. Purley.

Q. Where did he live? A. In the pump house. I could not say he lived in the pump house; he was there.

Q. You are acquainted with that sand pit? A. Yes, sir. I am acquainted with it in passing; I never worked there.

Q. I will ask you how much of that sand pit had been taken out as to acreage altogether before 1902 when Danzinger went there, outside of the right of way? A. I could not answer that.

Q. Was there much or little? A. Well, not a great deal.

Q. Was there any taken outside of the right of way up to 1902, if so, how much? A. There was a good deal, but I could not say how much.

Q. As much as an acre? A. I could not tell you.

Q. As much as a half acre? A. I could not say.

Q. Where was it taken with reference to the right of way? A. They ran up the right of way and gradually made the switch off at an angle and gradually went off the right of way.

Q. Do you know when they got off the right of way? A. Well, not the date, I don't.

Q. About what year did they finally get off the right of way? A. That is a hard question; I could not answer that.

Q. Did you ever see a time from the time the railroad came there up to 1902 when that sand pit was not being worked at all? A. I have only seen the sand pit in passing through there; I never worked there. I had hogs running in there and I would go down there every week or two weeks. Sometimes there would be cars there loading and again there would be cars setting in there. I know someone was at the pump house all the time.

Q. How often would you go up there and nobody be loading sand? A. I would go there and there would be nobody there loading sand, but there would be cars in there maybe, and I have been there when there seemed to be nothing in there.

Q. Was there anybody living there except at the pump house? A. Mr. Purley. I don't think anybody located there until Carroll came there. Mr. Purley was the pumper and maybe stayed in the pump house. There was a shack there, I don't know how long it stayed there. It seemed to be a shed to protect people there.

Q. You don't know how long the shed stayed there? A. No, sir; I do not.

Q. Is there more than one sand pit at Fletcher?

Judge Kennerly objects as leading.

Objection overruled.

Defendants except.

The Witness: No, sir; not but one that I know of.

Q. Which side of the railroad is it on? A. On the west side.

Q. This taking of the sand in that sand pit that has been taken away, and with what is left there, how many acres will it cover? A. I think about nine or ten acres.

Judge Kennerly objects for the same reasons.

Objections overruled.

Defendants except.

CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. We are desirous of giving you an opportunity of correcting anything in your testimony given at the last term of court and which was read yesterday which is not correct. You heard your testimony read yesterday? A. Yes, sir.

Q. Is there anything you want to say to the jury about your testimony not being correct? A. No, sir; I don't know that there is.

Q. You don't think of anything at all? A. No, sir; I don't think of anything.

Q. You say there was a shack there as early as 1893 or 1894, what was your statement about that? A. It was later than that.

Q. When did you first see that shack? A. I think about 1896 or 1897.

Q. Was that apparently being used in connection with

the sand pit? A. I suppose so. It was there and seemed to be a kind of shelter or something.

Q. It was large enough for men to sleep in if they had to? A. Yes, sir; they could have slept there.

Q. It was a shelter they could run into in case of rain?

A. Yes, sir; it was all right in case of rain.

Q. You said to Mr. Gordon that whenever you would go down there, there was apparently something going on; was that your statement? A. There seemed to be something going on most of the time. I could see signs of work there, that is what I meant to say. I never investigated much or asked any questions about the work there; I did not care anything about it.

Q. It was practically continuous from what you saw there? A. Yes, sir; from what I seen.

Q. I want to ask you about the place up the track there about two or three hundred yards beyond the station where witnesses have testified that the Santa Fe excavated some?

A. Yes, sir; it is up there all right.

Q. How far is that beyond the station? A. It seems to me that it is two or three hundred yards; I noticed that place up there both on the east and west side of the track; I don't remember so much about the east side, but it is on the west side. I do not say it is not on the east side; my memory is not so very clear about that, though.

Q. There is a place there on the west side though? A. Yes, sir.

Q. You don't undertake to say what the parties have contracted in reference to the sand pit? A. No, sir.

Q. You are just making a guess at what you think was the sand pit? A. Yes, sir.

W. H. KNUPPLE, a witness for plaintiffs and interveners,
testified as follows:

Questioned by Mr. Gordon:

Q. What is your age? A. I am fifty years old.

Q. Where do you live? A. I live at Silsbee.

Q. How long have you known the sand pit at Fletcher?

A. I have known the old sand ridge all my life; I was raised in five miles of it.

Q. The railroad went through there in 1893 or 1894, and Mr. Danzinger commenced taking sand out of there under a contract with the Houston Oil Co. in October, 1902. Now between 1894 and 1902, and limited to that, about how much sand had been taken out of there outside of the right of way, altogether? A. Well, now I never paid a great deal of attention to it. My judgment would be something like an acre taken out.

Q. Altogether? A. Yes, sir.

Q. Do you know when they first got outside the right of way in that excavation? A. No, sir; I do not.

Q. Now, did you ever see the time when there was nothing being taken out of that sand pit? A. Yes, sir.

Q. During those years? A. Yes, sir.

Q. How often would that occur? A. Well, that would be hard for me to say. In 1893 I think it was the road went through there. I lived at that time at Hooks switch. I lived there and followed the first logging camp that the people had that was on the league above there, but I lived there and went backwards and forwards every two or three days and sometimes every day as long as the camp stayed there until in the spring. There was very little sand being moved at that time

at all, but later they moved more sand. My recollection is that when I saw them move more sand than at any other time was in 1897. I saw at one time six cars on the switch. I worked there a few weeks on a few cypress telegraph poles, and we put them on at the sand pit and loaded them out there. I was there pretty often and there was a little sand loaded, not much. I would pass around there backwards and forwards and sometimes would pass there going hunting and fishing. I know I have seen the place as many times when nothing was being done as I have when something was going on there. I have passed there along about that time when there would be cars on the switch and I would not see anybody at all, and then I have been there when there were no cars in there at all, and then I have been there when they were loading cars.

Q. Now, when was the first time that any house was built there? A. I don't remember any house except the pump house built there about the time the road went there until Mr. Carroll put up a little house there about 1901, I think.

Q. Before that time did anybody ever live there except the pumper? A. No, sir; not for a good while. I don't remember anybody living there except the pumper and Mr. Carroll since the road went there.

Q. How big is that sand pit at Fletcher in acreage, including the sand taken out and the sand left there?

Mr. Lee: We make the same objection and reserve the same exception.

The Witness: The sand pit, I should think, was somewhere between seven and nine acres, the sand pit and sand hill.

Q. Give its boundaries as near as you can? A. I don't know hardly how to do it.

Q. It is bounded on the east by the railroad? A. Yes, sir.

Q. Is there any other sand pit on the Fletcher league that you know anything about? A. No, sir.

Q. Counsel has exhibited a map indicating where the railroad passes through the sand hill two or three hundred yards north of Fletcher; has there ever been a sand pit there?

A. No, sir; no more than a point of the same sand ridge. It comes to a point and plays out, what you would call sand, it is sandy.

Q. There has been no sand pit worked around there except the one you have spoken of? A. No, sir; not that I know of.

Q. I will ask you what kind of land that is on the Felder league? A. Broken land with hammocks, bushes and piney woods and the sand pit.

Q. Outside of the sand pit and outside of the swamps on the land, I will ask you whether or not the remainder of the land is suitable for cultivation? A. Yes, sir, there is a great deal of splendid hammock land on it.

Q. Do you know anything about the Texas Pine Land Ass'n or the Reliance Lumber Company cutting any timber on the Felder league? A. No, sir; I don't know of the Texas Pine Land Ass'n cutting any timber there. We moved above the league and cut the other way.

Q. Were you engaged in that business? A. Yes, sir.

Q. One of the cutters? A. No, sir; I was a hauler; I was one of the haulers there.

Q. When was that? A. It must have commenced in the fall of 1893, I think, it might have been 1894.

CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. You said the sand pit was about nine acres. You don't mean to say that was all the sand on the Felder league?

A. It was all I called the sand ridge and pit; of course most of that country is sandy, piney woods.

Q. Is it not a fact that where the road crosses the Felder league they had to put clay on it so they could get across? A. No, sir; they have been crossing there since I was a boy.

Q. Were you there the day Mr. Gordon's automobile choked up in the sand? A. No, sir.

Q. Speaking of the sand ridge, the railroad crosses near the edge of the sand pit, the sand ridge, and there is a little of the sand on the other side? A. May be.

Q. Are you swearing there is not on the Felder league numerous places where sand as good as this sand could be taken? A. I don't know of any place anything like it.

Q. Do you claim to have knowledge of the Felder league so you could say there is no such place on it? A. Yes, sir; no such place as that there at the sand pit.

Q. Do you swear that on the eastern part of the Felder league there is no place where sand as good as this sand can be taken? A. Yes, sir; according to my judgment about it.

Q. You don't swear there is not sand? A. Yes, sir; there is sandy places.

Q. Is it not sand within a half mile of the river? A. No, sir; I don't think there is any that close to the river.

Q. Does it not go a mile or two east, that sand? A. No, sir; no more than a sandy, piney woods.

Q. Then after you cross a creek that runs into Village Creek, don't you strike more sand and get on another sandy ridge? A. Yes, sir; it is sandy, piney woods in there.

Q. Is there not a place near Village Creek and below Fletcher where the creek makes a bend and leaves a good deal of sand? A. I don't know of any place there.

Q. You have never gone there to look for it? A. No, sir; I did not look for sand. I have been all over the league a good many times. There is lots of sandy, piney woods there.

Q. You know, don't you, that the GB&KC Railroad is ballasted out of the sand pit at Fletcher? A. Yes, sir.

Q. What year was that done? A. I think it must have been in 1894 that they hauled sand back this way.

Q. Were they not putting it in the lowest places about Pine Island Bayou? A. Yes, sir.

Q. Was there not a vast quantity of sand taken out there? A. I don't know, I was not there much.

Q. Was not that a kind of swamp about Pine Island Bayou? A. Yes, sir. My recollection is that they used the steam shovel pretty regularly about a month and hauled sand.

Q. You have been there when you did not see anybody at the sand pit? A. Yes, sir.

Q. Did you ever pass a farmer's farm and not see him at work? A. Yes, sir.

Q. That is a frequent thing? A. Yes, sir.

Q. When you were down there and did not find people at the sand pit, would you find the track taken up? A. No, sir; I don't think the track was ever taken up since it was put in there.

Q. When you would go up there you would see empty cars in there and cars with sand on them? A. Occasionally, not all the time.

Q. You think there was a little shack there? A. No, sir; I don't remember anything particularly except the pump house.

Q. You are not swearing it was not there? A. No, sir; if it was there, I don't remember it.

Q. You don't swear it was not there? A. No, sir; I think at one time I remember some tie slabs; I don't know whether one side or both sides. It was a place for people to run in out of the rain; I would not call that a house.

Q. You have never had anything to do with the sand pit? A. No, sir; I never did any work there except when they got the poles.

Q. You were there two or three weeks? A. Yes, sir.

Q. They were loading cars all the time? A. No, sir, part of the time.

Q. The only thing you know except during the two or three weeks was what you learned in passing back and forth going and coming? A. Yes, sir; when I was over there in the spring of 1893 and 1894, I would be there two or three or four times a week.

Q. You know when Danzinger went there? A. Yes, sir.

Q. The operation before he went there was about the same as it has been since? A. I don't think it was as great before he went there.

Q. At least seven-eighths as great, was it not? A. I could not say, I don't know very much about Danzinger's work except hearsay.

Q. You don't know very much about it before he went there, do you? A. Not a great deal.

Q. You don't mean to swear that the G. B. & K. C. Railroad did not take a lot of sand out of there some two or three hundred yards beyond Fletcher station, do you? A. I remember there is a small place along here excavated (referring to the map). I never paid a great deal of attention to it. I never saw anybody at work there.

Q. You would not swear that Mr. Jim Withers did not run a steam shovel there? A. Yes, sir; but my recollection is right along the edge of the right of way; that is the way I remember it now.

WILEY BRACKIN, a witness for the plaintiffs and interveners, testified as follows:

Questioned by Mr. Gordon:

Q. How old are you? A. 34 years old.

Q. Are you acquainted with sand pit F at Fletcher? A. Yes, sir; I am acquainted with the sand pit there.

Q. How many sand pits are there? A. One.

Q. How many acres does that sand cover, taking the sand that has been removed and that remaining there?

Judge Kennerly: We make the same objections.

Objections overruled.

Defendants except.

Q. Just answer the question? A. Between seven and nine acres.

Q. Do you know of any other sand pits on the Fe'der league? A. No, sir.

Q. No others? A. No, sir.

Q. What is the character of the land on the Felder

league? A. Right along the creek where it overflows there is a deposit of sand on top of the soil. You can dig under it. In some places the soil is on top of the ground, and in some places the sand is a foot or two deep, and after you get away from where the creek overflows proper, it is like any other soil, it is not gumbo, but is a kind of black dirt. It is like any other piney woods country; there is some swamp and some hammock and some cypress brakes on it which are very low and wet.

CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. There is lots of sand on the Felder league? A. Yes, sir; there is a pretty big pile of it at Fletcher where the sand pit is, and there is some along the creek in places now and then. You will occasionally reach a place a hundred yards wide and maybe six inches deep where there is sand.

Q. There are numbers of that kind of places? A. Well, below the railroad is scattered piles of it where it is washed out from the creek.

Q. Sometimes the places will cover an acre? A. I could not say places of an acre, maybe a half acre. It all seems to be there by the creek overflowing.

Q. When you speak of seven to nine acres of the sand pit, you are just giving your idea of the sand pit? A. Yes, sir.

Q. You were not giving it in reference to any contracts anybody has made about it? A. I know of no contracts.

Q. Who are you employed by? A. I am secretary of the Village Mills Co.

Q. Mr. Ben Hooks is connected with it? A. Yes, sir; he is one of the stockholders in it.

RE-DIRECT EXAMINATION.

Questioned by Mr. Gordon:

Q. Any evidence of sand running out from the sand pit around over the league anywhere? A. I have never seen it, and I have been over it closely.

Q. Did you see any sign of anything like that? A. No, sir.

Q. The sand that is there gives the appearance of having been put there by the creek? A. I am very positive it is. Last spring we had a couple of rises and places where the natural soil was the sand is four feet deep now. It was all over in three days' time while the water was up. I can show you places where sand banks were and it has moved it and deposited it down the creek.

RE-CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. Sand shifts? A. Yes, sir.

Q. You have not excavated down on the Felder to see about evidences of sand other than at Fletcher? A. No, sir; except in front of Abe's house.

Q. Have you made any excavation or investigation there? A. You can see the soil.

Q. Is it not a fact that where they plowed sand up there in the public road they found sand four or five feet deep? A. No, sir; I don't know that.

RE-DIRECT EXAMINATION.

Questioned by Mr. Gordon:

Q. Did you dig any wells there? A. Yes, sir.

Q. Did you find any sand? A. Yes, sir.

Q. Where? A. In a foot of the top of the ground,

and the sand will go four or five feet deep, and then after that you strike quicksand and water. 24 feet is about the depth of our wells and we struck water sand and got water there.

J. P. BUMSTEAD, testified for the plaintiffs and interveners as follows:

Questioned by Mr. Gordon:

Q. How old are you? A. I will be 65 the 25th of Feby.

Q. You were born and raised on the Felder league?

A. I was born and raised on the place I am living on or within 300 yards of the Felder league. That is the M. W. Bumpstead survey.

Q. Is that on the Felder league? A. The Felder laps over on it.

Q. Were you summoned here by the Houston Oil Co.?

A. Yes, sir.

Q. Do you know why they didn't put you on the witness stand? A. No, sir; I don't.

Q. Do you know where the sand pit is? A. Yes, sir.

Q. How long have you known it? A. Ever since it has been a sand pit.

Q. How big a place does the entire sand pit cover including the sand taken out and the sand still there? A. About nine acres.

Judge Kennerly: We make the same objection.

Objections overruled.

Defendants except.

Q. Now, prior to the time Danzinger went there in 1902 and commencing with 1894 when the railroad first got

in there, the early part of 1894, I will ask you how often they took sand out of that place approximately? A. Well, I could hardly tell you how often. The railroad company taken sand out of the right of way there for their own use. Sometimes they would put the section hands in there and work a day and load the cars. They had a side track right in the right of way. They put side tracks right in where the spur still stands. They put the side track there and used the sand to ballast up the low places in the track. Sometimes they would load the sand with section hands. They would work there loading sand for a day and it would be probably a week or ten days before they would get any more there. It was that way for a year or more. I don't remember just how long the section hands loaded sand there off that right of way.

Q. I will ask you whether or not that pit was worked all the time until Mr. Danzinger went there in 1902? A. No, sir; not all the time.

Q. How long between the workings would the time be? A. Well, at one time it was three or four months that it lay idle.

Q. Was there or not other times when there would be nothing doing? A. Yes, sir; there were other times when they would be idle for a month or such a matter.

Q. Until Mr. Danzinger commenced in 1902, how much did they get outside of the right-of-way; how much land did they get sand from outside of the right-of-way up to 1902? A. About a half acre.

Q. Do you know when they first got over outside of the railroad right-of-way? A. Yes, sir.

Q. About when? A. I think about 1897.

Q. About 1897 they first commenced to get outside of the railroad right-of-way? A. Yes, sir.

Q. During all those years from 1894 until 1901 did anybody live there? A. No, sir; nobody except the pumper.

Q. Where did the pumper live? A. In the pump house.

Q. On the right-of-way? A. Yes, sir.

Q. When did Mr. Carroll build his house there? A. In 1902; his wife built the house; I helped her get up the studding to nail the weather boarding to and she put the house up there herself.

Q. And then Mr. Carroll lived there in that house? A. Yes, sir.

Q. What was he doing there? A. Running the pump.

Q. Do you remember Mr. Danzinger building a house still northwest of this after that? A. Yes, sir.

Q. Who built that house? A. I did.

Q. What year, do you remember? A. No, sir; I don't remember just what year it was.

Q. How long after Mr. Carroll built his house? A. Some four or five years afterwards, three or four years, something like that; I think it was in 1906 or 1907, that I built the house, in December.

Q. Will you please tell the jury who for the last 20 years has been living on the west end of the Felder league? A. I live on the west side of the creek on the Felder league. My brother for one and myself for another and Mr. Walton for another, and there has been two or three different people lived on the Slade tract for Mr. Sam Hooks. I lived on it myself in 1900—in 1890 I mean, I rented it and lived on it, and then a man named Harrin lived on it and a man

named Rhodes and a man named Large and a man named Bumpstead, my son, and a man named Johnson is now living on it. Some one of them has been living there all the time.

Q. Now, I will ask you whether or not that place you last mentioned is on the 2578 acres of the Felder sub-division on the north part of the league, the Slade tract? A. Yes, sir; it is on it.

Q. Mr. Walton lives on the northwest corner? A. Yes, sir; the northwest corner of the Felder, and the northwest corner is right in his field.

Q. I will ask you if those folks have been occupying the land practically continuously for the last 20 years? A. Yes, sir; longer than that.

Q. Are any of those people claiming under the Houston Oil Co., or the Texas Pine Land Ass'n.? A. No, sir.

CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. The facts are there were some small surveys located in conflict with the Felder on the west side of the creek?

Mr. Gordon: Just state what you know; don't give an opinion.

The Witness: We don't consider they conflict with the Felder at all; the Felder conflicts with them.

Q. Nobody by the name of Goodrich has tried to put you off? A. No, sir.

Q. Did you ever hear of any of the Morgan heirs being there trying to put you off? A. No, sir.

Q. You testified two years ago when this case was tried? A. Yes, sir.

Q. The defendants in this case are desirous of giving you an opportunity to correct anything in your testimony which was given then which was not correct. Will you point out to the jury anything in your testimony given two years ago that you want to explain to the jury as not being correct?

A. Well, I don't know.

Q. You were in the court room when I read your testimony yesterday? A. I think not; I don't think I was.

Q. Mr. Lee read it; you heard your testimony read didn't you? A. No, sir; I did not.

Q. Do you remember anything you said on the stand two years ago that you don't want the jury to consider; if there is, I don't want the jury to consider it? A. Well, I think I made the statement that there was a camp on the Felder at Massey Lake, and that was not so.

Q. You made a mistake about that? A. Yes, sir; because the north line of the Felder runs about 150 yards south of where the camp was.

Q. Now, is there anything else? A. No, sir; not that I know of.

Q. You don't recollect anything you testified to two years ago and do not stand by now before this jury? A. No, sir.

Q. You had nothing to do with the operation of that sand pit, did you? A. No, sir; I had nothing to do with it.

Q. This time that you say it was vacant for three or four months, was that not after Mr. Danzinger went in there? A. No, sir; before Mr. Danzinger went in there.

Q. Is that the time Mr. Carroll testified about that the boarding cars were were in there? A. Yes, sir.

Q. That was the time? A. Yes, sir.

Q. Then, it was not six months as Mr. Carroll says, but three or four months? A. I don't remember how long the boarding cars were there. They were there all the time they raised the bridge. They had to go there and raise that bridge to get it above high water. They went there some time in the spring and were there all the summer.

Q. You are not willing to say that the railroad company did not go up their right-of-way two or three hundred yards and get sand there during that time? A. I don't know whether they did or not.

RE-DIRECT EXAMINATION.

Questioned by Mr. Gordon:

Q. Do you know whether or not the Texas Pine Land Ass'n., ever cut any saw-log timber off that land? A. No, sir; I don't; I don't think they did.

Q. You don't think they did? A. No, sir.

L. F. DANIELL, a witness for the plaintiffs and interveners, testified as follows:

Questioned by Mr. Gordon:

Q. What kin are you to Wm. A. Daniel? A. None whatever.

Q. Are you a surveyor? A. Yes, sir.

Q. What experience have you had in surveying? A. About thirty years.

Q. Did you do the surveying laying out of the G. B. & K. C. Railroad? A. Well, at the upper end from Kirbyville to Jasper I did.

Q. Have you or not in the last few days made a sur-

vey of the sand pit excavation at Fletcher as pointed to you on the ground by Mr. Danzinger, showing where he commenced the excavation in 1902 when he went there and since that time? A. Yes, sir.

Q. Up to about 1912? A. Yes, sir.

Q. Did you accurately survey that? A. Yes, sir.

Q. Have you got a plat of it? A. I think you have it.

Q. Did you locate the sand spur or switch as it was pointed out to you on the ground by Mr. Danzinger? A. Yes, sir.

Q. At the time he went there in 1902? A. Yes, sir.

Q. I will ask you to examine this plat and state whether or not you drew it? A. Yes, sir; that is my work.

Q. Is that a correct representation of your work actually done on the ground? A. Yes, sir. With perhaps the space between the larger A and the smaller one, the scale may not be exactly right; otherwise it is as absolutely correct as I could make it.

Mr. Gordon: We offer this plat in evidence.

NOTE:—Plate ordered sent up to the Appellate Court.

Q. This is north in this direction? A. Yes, sir.

Q. This end of the plat is north? A. Yes, sir.

Q. Now this straight heavy line represents the railroad? A. Yes, sir.

Q. And the straight dotted line on either side represents the right of way 100 feet wide? A. Yes, sir.

Q. And the heavy dotted line represents the sand side-track or switch? A. Yes, sir.

Q. As was pointed out to you by Mr. Danzinger? A. Yes, sir.

Q. How far is it from the end of that sand track to the right-of-way? A. It is 80 feet. He pointed out that specific point there and said that was the end of the track at the time he began work or took charge of it.

Judge Kennerly: We object to anything Danzinger told the witness about it.

The Witness: He pointed out this point here and I measured across at right angles with the railroad and found it to be eighty feet; I ran the line from there to where it crossed the right-of-way. I measured to the head block up here and it was 226 feet. The track as now on the ground is a little different, it is further west.

Q. Now, what do those triangles or those courses and distances embrace? A. They represent the piece of land pointed out at different points, each course and distance as judged by Mr. Danzinger as the points he obtained sand from. I measured from a point he pointed out here, and went around on the edge of the sand pit as near as I could go half way from the bottom to the top that he represented he had taken out.

Q. How many acres does that embrace altogether? A. $94/100$ of an acre.

Q. How many acres does the little one over here embrace? A. $14/100$ of an acre.

Q. Now, did you also take any measurements in what is called the new pit to the northwest of this one? A. Measurements, I did not take any bearings.

Q. Examine this and state whether or not it is a practical representation of that? A. Yes, sir; that is practically as it was.

Judge Kennerly: What do you mean by the new pit?

Mr. Gordon: The one excavated since 1910. Danzinger testified that he commenced the excavation in 1910.

Judge Kennerly: There is no evidence that any sand has been removed since the suit was filed. Counsel make the statement that Danzinger said that I don't want the jury to consider that as evidence.

The Court: The witness must swear to his testimony. The jury will not consider what counsel says. If he testified to it, you may consider it.

Mr. Gordon: For the purpose of identification, we will call this the new pit.

Q. Now did you take some measurements in there?

A. Yes, sir.

Q. Tell the jury what measurements you took? A. I took measurements approximately east and west, which was 400 feet long, and then at the west end, 45 feet wide between the outer embankment and the ridge that had been left in the pit, and also to the north of this ridge was 45 feet, and then there was an excavation out in a circle to the north, and also a small one to the south up there up there on the ridge that run through it.

Q. How much did you find embraced within that area?

A. Approximately two acres.

Q. This is a duplicate of that plat? A. Yes, sir.

Mr. Gordon: We offer that in evidence also.

Q. That lies in that direction from the first pit you measured, rather in a northwest direction? A. Yes, sir. Northwest.

CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. You were there when? A. I don't remember, the date is on the map.

Q. Did you see me there? A. No, sir.

Q. I show you a photograph offered in evidence and numbered 2, showing some roots and trees there in that excavation nearest the railroad track? A. Yes, sir.

Q. You saw those roots? A. Yes, sir.

Q. They are there? A. Yes, sir.

Q. There is the depot and there is the water tank, get your bearings from that. Did you include that territory in your plat? A. There is one point here I can show you on the map.

Q. Show the jury on the photograph about that? A. At the point on the map where I started was just about this point.

Q. This part of the picture you did not get in your plat at all, the part that run here up towards the old house; you did not put that in the plat, did you; there is a part left out, the space between these two points; in other words your plat is just a part of the situation out there? A. Yes, sir.

Q. How much of that excavation did you leave out of your plat? A. What I left out between the two points would probably be not exceeding a twentieth of an acre.

Q. Why didn't you put that in? A. It was not pointed out to put in.

Q. You put in your plat the place around the stumps back out 10 or 15 feet deep? A. I think a portion of it.

Q. Why didn't you put it all in? A. I was not instructed to.

Q. Did you have in the plat the territory for 150 feet around the old house where the man stands there? A. There is one corner right near, just to the east of where

the old house is. That is where one corner of the land I surveyed was. I went past that house on up here too.

Q. About what portion of this picture No. 2 did you get in your plat; did you get as much as a third in there?

A. I started here and went around there and came back; I could not tell by the trees. I know there was a little space between the points I surveyed.

Q. Is it not a fact that at least two-thirds of the excavation there that is shown in picture No. 2 you did not put in that plat at all? A. I don't think so.

Q. Is there a half that you did not put in? A. I don't think there was a fourth of it left out.

Q. There was a fourth left out? A. There might have been I did not get the territory north of where we went. I don't know whether that was ever excavated out or not.

Q. You did not go there at all? A. No, sir; I did not go in there.

Q. You did not purport to go out there and make a complete survey of those excavations and a plat of it so as to give an intelligent idea to the jury; you did what Mr. Danzinger told you to do? A. I did what he pointed out to be done; the points he pointed out, I surveyed from those points.

Q. The points he pointed out you put in? A. Yes, sir.

Q. And left out the balance? A. Yes, sir.

Q. You see these high banks in picture No. 2? A. Yes, sir.

Q. They are there? A. Yes, sir.

Q. About how high are those banks? A. About 10 feet.

Q. The sand has been scooped out to the depth of ten feet? A. Yes, sir; eight or ten feet; it was deeper in some places than others.

Q. Now, go to picture No. 1, how much of that did you put in your plat; you recognize the old house there? A. Yes, sir; I recognize that.

Q. You came to this point somewhere about where the man is standing? A. Yes, sir; I went half way up the embankment and then went on a northwest course.

Q. There is a lot of that territory you did not put in your plat at all? A. No, sir; we put everything to the south in.

Q. To the north you did not? A. No, sir; I don't know how far north it went.

Q. How high are these embankments in No. 1, here? A. They are eight or ten feet.

Q. Is it not a fact that they are nearer 15 feet high? A. No, sir; I don't know; I did not measure them.

Q. You did not undertake to find the area of that or the cubic yards of sand taken out there? A. I undertook to find the area of what was pointed out as the portion that had been excavated by Mr. Danzinger.

Q. You don't know whether that is correct or not? A. No, sir; he only pointed out the beginning and ending and that sort of thing.

Q. Your plat does not show the present switch there at all, does it? A. No, sir; only a portion of it.

Q. It is in evidence that that switch was moved around from time to time as they took sand out there; you don't

pretend to tell the jury that that switch was like it is today, do you? A. No, sir.

Q. Or at any time? A. No, sir; only what was pointed out to me.

Q. You don't know of your personal knowledge where it was? A. No, sir; only I saw evidence of it further on.

Q. Now, then, coming to the excavation furthest from the railroad track up there towards the northwest; did you go up to that one? A. Yes, sir.

Q. Separate from the others? A. Yes, sir.

Q. Is it not a fact that there are some old tracks in there? A. Yes, sir; narrow-gauge tracks.

Q. Are they not there today? A. Well, I did not specially notice them, they were there; I noticed the small iron.

Q. Examine picture No. 3, and see if you saw those tracks there? A. I think there are some like that.

Q. You recognize that picture as being about the situation? A. Yes, sir.

Q. You see the bank where a man is standing on it? A. Yes, sir.

Q. Is not that bank 15 or 20 feet high? A. No, sir; it could not be that high.

Q. How high do you say it is; did you measure it? A. No, sir.

Q. How high is it? A. I think probably 12 or 15 feet high.

Q. Do you swear to that? A. Well, portions were not as high as that.

Q. I speak of the place where the man is standing, you recognize that, do you? A. I don't recognize the

house and don't know which way the picture is pointing. To the south as you enter the pit it went into a narrow-gauge as we call it.

Q. Now, is it not a fact that back in towards what would be the southwest on this plat, there is a lot of that territory you did not include? A. No, sir; not an inch of it.

Q. Where did you leave it out? A. Between those two points here.

Q. So you swear that there is but 94/100 of an acre here? A. Yes, sir; what I surveyed around.

Q. You swear there is only 94/100 of an acre in the excavation where the trees are standing? A. I did not go out here.

Q. How did you find how much was there? A. I surveyed it.

Q. How did you survey it? A. Without going by those trees. I told you that that was left out.

Q. You mean around where the trees were? A. I could not tell you where the trees were; as I told you awhile ago, there was a small space left out and that must have been the space right in here. There was some in here left out.

Q. Is that where the stumps were? A. There were some stumps in there. I don't recognize this exactly. This looks like it is jammed against the house.

Q. What became of the sand around the stumps, did that take wings and fly away? A. I don't know.

Q. You don't take that territory around the stumps in your plat? A. I could not tell you whether this was included, I don't think this stump was; it might have been;

we went from a point here. I can show you on the map. There was no territory where sand was taken from a point a little east of the house on this line running here; that was up the embankment and there was nothing left out here.

Q. You did not put in the territory adjacent to and around the large stump in picture No. 2 in your plat? A. I could not swear I did not, but there was a small portion of it left out.

Q. They did not tell you to go up there and make a complete survey of the sand pit and make a plat showing the sides there? A. No, sir; not at all.

Q. They did not tell you to make it complete? A. No, sir.

Q. Who was with you? A. Mr. Gordon and Mr. Easterling and Mr. Danzinger.

Q. You put in what Danzinger told you to? A. No, sir; he pointed out the place.

Q. What he wanted in? A. I could not tell you that.

RE-DIRECT EXAMINATION.

Questioned by Mr. Gordon:

Q. Mr. Danzinger on the witness stand in this case has sworn that he pointed out to you the outside lines of the land he commenced excavating in 1902, and the entire lines he has excavated to since that time. Now, then I will ask you whether or not you included in your plat all of the land then pointed out to you by Mr. Danzinger on the ground? A. I did.

RE-CROSS EXAMINATION.

Questioned by Judge Kennerly:

Q. Did you use a compass? A. No, sir; a transit.

Q. Did you measure it? A. Yes, sir.

Q. Who carried the chain? A. I don't remember the names of the men, one was a white man and the other was a negro.

Mr. Gordon: We offer in evidence a letter dated Houston, Texas, June 7, 1911, on the letter head of the Houston Oil Co., of Texas, General Manager's Department, signed A. W. Standing, General Manager, and addressed to Messrs. H. G. Brown Supply Co., Beaumont, Texas.

Judge Kennerly: We object to it because the date of it shows it was written since the suit was filed, and the status of the parties could not be affected by the letter. We object further because it is wholly immaterial and irrelevant to any issue in the case, and if offered for the purpose of varying the written contract, the contract is in evidence here and there is no ambiguity about it, and it can not be admitted for that purpose.

Objections overruled.

Defendants except.

"In replying to this letter please refer to this department.

Houston Oil Company of Texas
General Manager's Department
A. W. Standing, General Manager.

Houston, Texas, June 7th, 1911.

File P-1.

Abstract No. 21, Chas. A. Felder Survey, Hardin County.

Messrs. H. G. Brown Supply Co.,
Beaumont, Tex.

Gentlemen:—

Replying to your favor of the 3rd inst. I notice from the sketch you sent in that you want to locate the

sand pit West of the Santa Fe Railroad and in close proximity to another sand pit located there. We were under the impression that you desired to take sand from off our tract and East of the Railroad and we have a large quantity of sand on that side of the road and we would be willing to enter into a contract with you; we, however, would not be willing to furnish sand to the Santa Fe for nothing—in other words, we would expect them to pay a reasonable amount per car, similar to what other people are paying us, for same.

Please advise further relative to this proposition.

Yours very truly,

A. W. STANDING,

AWS-GC

General Manager."

Mr. Gordon: You don't make any point that Mr. Standing did not write the letter.

Judge Kennerly: No, sir.

Mr. Gordon: We offer a letter from A. W. Standing to the same parties, dated Houston, Texas, July 7, 1911, after this suit had been filed and had come to their attention.

Judge Kennerly: We make the same objection to that letter.

Objection overruled.

"In replying to this letter please refer to this department

Houston Oil Company of Texas
General Manager's Department

A. W. Standing, General Manager

Houston, Texas, July 7, 1911

File—P-1.

Abst. 21, Charles A. Felder Survey. Hardin County.

H. G. Brown Supply Co.,
Beaumont, Texas.

Gentlemen:-

Referring to the correspondence we have had in relation to the proposed sand pit which was wanted by you, location to be on the above league, we have decided that at the present time it would not be advisable to lease same for that purpose.

Yours truly,

A. W. STANDING,

AWS-JEC

General Manager."

Defendants except.

Mr. Whitaker: We offer in evidence the plaintiffs' first amended original petition filed in this court on the 21st of November, 1913, in case No. 449, styled John A. Walker et al. vs. Beaumont Shingle & Lumber Co. et al. I only desire to read a portion of it.

This is a suit, as shown by said pleading, by John A. Walker, et al., against Beaumont Shingle & Lumber Co. et al., filed in the United States District Court for the Eastern District of Texas November 21, 1913, in trespass to try title to recover the following tract or parcel of land, to-wit:

"That the premises so entered upon and wrongfully withheld by the defendants from plaintiffs are described as follows:

All that certain tract of Eighteen Hundred and Fifty (1850) acres of land, out of that certain league of land in Hardin County, Texas, granted to Charles A. Felder by the Government of Coahuila and Texas on the 29th day of August 1835, and known as Grant No. 853, Vol. 23, Ab-

7
4
9

tract No. 21, said 1850 acres being out of the Southern portion of said league and more particularly described as follows:

Beginning at the Southeast corner of said Charles A. Felder League on the bank of the Neches River; thence West 10,635 vrs., to the Southwest corner of said league; thence North along the West line of said league far enough so that a line projected thence East to the Neches River, running parallel to the South line of said league and thence down said river to the place of beginning, will contain 1850 acres of land, being the same tract or parcel of land conveyed by James Morgan to William D. Lee, by deed dated October 17, 1845; and conveyed by William D. Lee to Benjamin E. Green, by deed dated September 25, 1846, of record in the Deed Records of Hardin County, Texas, in Book O, on pages 389 and 390; and conveyed by Benjamin E. Green to Richard C. Washington, by deed dated September 9, 1848, of record in the Deed Records of Hardin County, Texas, in Book O, on pages 391, 392 and 393; and conveyed by Richard C. Washington and Sophia, his wife, to William Walker, by deed dated September 22, 1848, of record in Deed Records of Hardin County, Texas, in Book O, on pages 393, 394, 395 and 396, to all of which deeds and records reference is made for greater certainty."

Judge Kennerly: We object to the instrument as wholly irrelevant and immaterial to any issue in this case, and, further, if offered for the purpose of showing that the chain of title offered in evidence which stopped in Walker was considered by the Walkers as applying to any particular portion of the Felder league, that such was not binding on the defendants in this case, and could not affect the rights of these defendants.

It was purely a view they took themselves, and these defendants were not parties to the suit and not bound by or estopped by their action.

Objection overruled.

Defendants except.

Mr. Whitaker offers in evidence contract between the Houston Oil Co. of Texas and the Texas Builders Supply Co. dated July 7, 1911, and beginning on p. 553 of the printed record in this case.

"State of Texas,
County of Harris.

This contract made and entered into this the 7th day of July, 1911, by and between the Houston Oil Company of Texas, hereinafter known as First Party, and the Texas Builders Supply Company, hereinafter known as Second Party, witnesseth:

Whereas, The First and Second Party on the 27th day of May, 1903, entered into a contract and agreement substantially as follows:

"This contract this day entered into by and between the Houston Oil Company of Texas, hereinafter styled "Oil Company," and the Texas Builders Supply Company, hereinafter styled "Supply Company," represents that,

Whereas, The said oil company is the owner of a certain sand pit at the station of Fletcher, in Hardin County, Texas, on the line of the Gulf, Beaumont & Kansas City Railway Company, said sand pit being known as pit "F," and is willing to sell sand out of said pit to said Supply Company and said Supply Company

is desirous of purchasing sand from said pit from said Oil Company:

Now, therefore, The Parties hereto agree between themselves as follows, to-wit:

First—The Oil Company hereby agrees to sell the Supply Company sand out of said pit "F" at the following rates for each coal car, viz.:

(a) Where fifty cars, or less, of sand it taken in any one month, one dollar and seventy-five cents per coal car.

(b) Where upwards of fifty cars in any one month, to one hundred cars, in any one month are taken, one dollar and sixty cents per car.

(c) Where upwards of one hundred cars are taken in any one month, one dollar and forty-five cents per car.

(d) Where upwards of one hundred and fifty cars are taken in any one month, to two hundred, one dollar and twenty-five cents per car.

(e) Where upwards of two hundred cars are taken in any one month, to two hundred and fifty, one dollar and fifteen cents per car.

(f) Where upwards of two hundred and fifty cars are taken in any one month, to three hundred cars, one dollar and five cents per car.

(g) Where upwards of three hundred cars are taken in any one month, one dollar per car.

Third—Said Supply Company shall take and pay for at least fifty dollars (\$50.00) worth of sand at the aforesaid rates each month, and if, during any month, the said Supply Company fails to load and haul as much

as fifty dollars (\$50.00) worth of sand at the aforesaid rates, it shall, nevertheless pay the Oil Company the sum of fifty dollars (\$50.00) on the fifth day of the following month. But in that event said Supply Company shall have the right to load and haul out during any succeeding month the sand so paid for. The said Supply Company shall have the right to load and haul out from said sand pit as much sand as they may desire during the life of this contract, at the prices hereinbefore fixed. Payment for the sand loaded and hauled out shall be on or before the fifth day of the month following the month during which such sand is loaded and hauled out. During the life of this contract said Supply Company shall have exclusive right to load and haul sand out of said pit. The Supply Company shall furnish the Oil Company at the end of each month, or as soon thereafter as practicable, a statement from the Gulf, Beaumont & Kansas City Railway Company, showing the number of cars of sand shipped out by said Supply Company from said sand pit during such month.

Second—The said sand shall be mined and loaded at the expense of the Supply Company, the prices herein fixed to be paid the Oil Company being net to said company.

Fourth—It is expressly agreed and understood that either party hereto may terminate this contract at any time by giving the other party thirty days' written notice. If the contract is so terminated by the Oil Company, the Supply Company shall, nevertheless, have the right to take from said sand pit enough sand at the prices herein fixed to supply any contract which said

Supply Company may have, previous to said notice, in good faith entered into for the sale of sand out of said sand pit. The contract heretofore entered into between the parties hereto, dated the sixteenth day of October, 1902, shall cease to be of any further force and effect from the date of execution of this contract. It is especially understood, however, that the said Supply Company shall fully comply with the terms of said contract of the said sixteenth day of October, 1902, and pay for all sand taken thereunder previous to the execution of this contract at the prices fixed in said contract of the said sixteenth day of October, 1902, whether the said sand has been taken by the Supply Company, or by others, during the life of said contract, of the said sixteenth day of October, 1902.

It is therefore agreed:

First—That the above and foregoing contract shall expire on the 30th day of September, 1911.

Second—That if the Second Party has, under the provisions of said contract, paid the First Party for more sand than the Second Party has taken from the premises covered by said contract then said Second Party shall remove said excess of sand from said premises by September 30, 1911, and not thereafter. Nothing herein contained shall waive the requirement, prior to September 30, 1911, of the payment by the Second Party to the First Party of the sums of money per month mentioned in said contract. The intention hereof being to continue said contract above set forth to September 30, 1911, and no longer and that the Second Party shall during said period remove from said premises all sand for which the Second

Party has paid or may pay by September 30, 1911, and that the Second Party shall not be entitled to take sand from said premises under said above quoted contract after September 30, 1911.

Third—To take effect October 1, 1911, the said First Party and the said Second Party enter into the following new contract and agreement:

(a) The First Party hereby grants unto the Second Party for the consideration hereinafter mentioned, the exclusive right to take sand to be utilized for mortar, concrete and similar work for shipment over the Gulf, Colorado & Santa Fe Railroad from the holdings of the First Party on.

Abstract No. 21, Charles A. Felder Survey, Hardin County. Said sand to be mined and loaded at the expense of the First Party and at the prices hereinafter fixed. It being the intention hereof that no sand be taken for any purpose other than such work as comes within the meaning of the above.

(b) The First Party hereby agrees for the consideration herein set forth not to grant a similar privilege to any person, firm or corporation for shipment of sand over the said Gulf, Colorado & Santa Fe Railroad on any of the holdings of First Party on any of the following surveys in Hardin County, to-wit:

Abstract No. 39, D. C. Montgomery Survey, Hardin County.

Abstract No. 7, M. M. Bradley Survey, Hardin County.

Abstract No. 19, Alfred Ellis Survey, Hardin County.

(c) Second Party agrees to pay unto the First Party at Houston, Harris County, Texas, on the first day of each and every month during the continuation of this contract, the sum of \$2.00 per car for each and every car of sand taken by the Second Party from the holdings of the First Party on the above named surveys during the previous month. By car, as above used, it is meant the usual and ordinary car now in use by the railroads and same to be loaded in the way and to the limit now customary. For the purpose of ascertaining the number of cars of sand taken by the second party from said surveys during the month, the Second Party shall on the first day of each month furnish the First Party a statement from the railroad where said sand is loaded of the number of cars of sand taken and shipped by said Second Party over said railroad during said month. Provided, however, that the Second Party shall pay unto the First Party at Houston, Harris County, Texas, the minimum sum of Fifty (\$50.00) Dollars per month. That is to say, that if the Second Party shall take from said survey less than twenty-five cars of sand in any one month said Second Party shall nevertheless pay to the First Party the sum of Fifty (\$50.00) Dollars for the sand so taken during said month and said payment to be made on the first day of the next month, as above set forth. And said Second Party shall not thereafter be entitled to take sufficient sand to make up the difference between the price of the quantity actually removed and said minimum payment.

(d) This contract shall be in force for a period of two years beginning October 1, 1911, and ending September 30, 1913.

Witness our hands this 20th day of September,
1911.

HOUSTON OIL COMPANY OF TEXAS,
By S. W. FORDYCE, Pres.

MARYLAND TRUST COMPANY, TRUSTEE,
By L. T. ZIMMERMAN, Pres.

(Seal of Maryland Trust Co.)

Attest:

FRANK REIMER, ASS'T SECRETARY MARYLAND
TRUST COMPANY, Trustee.

HOUSTON OIL COMPANY OF TEXAS,
By A. W. STANDING, Gen. Mgr.

(Seal of Houston Oil Company.)

Attest:

A. H. KENNERLY, SECRETARY OF THE HOUSTON OIL
COMPANY OF TEXAS.

Approved:

H. O. HEAD,

General Counsel for the Houston Oil Company of Texas."

Judge Kennerly: We object to it because the contract is wholly irrelevant to any issue in this case, and further, because it shows by its date to have been made and entered into after the filing of this suit and could not affect any matters occurring prior to the filing of the suit.

Objections overruled.

Defendants except.

W. A. McCLELLAN, being re-called by the defendants' testified as follows:

Question by Judge Kennerly:

Q. You have heretofore testified in this case? A. Yes, sir.

Q. You know Mr. Danziger, secretary of the Texas Building Supply Co.? A. I don't understand what position he holds; I have heard he was manager; I know him.

Q. Did he ever make any statement to you about from what portion of the Charles A. Felder league he claimed the right to take sand? A. Yes, sir.

Mr. Gordon: We object to any statement Mr. Danziger may have made, first, as hearsay; second, because his right to take sand is fixed by the terms of his contract.

The Court: I think you have the right to combat the testimony offered by the plaintiffs as to what sand pit F, was, but you are proposing to prove it by the declaration of a witness without accounting for the nonproduction of Danziger. I think it is hearsay.

Objection sustained.

Defendants except.

Judge Kennerly: The witness would have testified that Mr. Danziger said he was entitled to take sand from any portion of the Chas. A. Felder league.

The Court: Yes, sir, it is proper for you to show what the witness would have answered.

Q. Now, did you ever make any tests to determine the extent of the sand on the Chas. A. Felder league or evidence of sand thereon? A. No, sir, not on the Felder.

Q. Do you know anything about the extent of the sand on the Chas. A. Felder league otherwise than by tests? A. Yes, sir, I know about the extent of the sand on the Felder league.

Q. Well, what is it? A. Well, it is scattered pretty well all over it.

CROSS EXAMINATION.

Questioned by Mr. Gordon:

Q. The sand pit is not scattered all over it is it? A. Well, Judge, I don't know what you term the sand pit. I have heard a good deal said about the sand pit; I would not know just what to term the sand pit.

Mr. Gordon: That will do. That is enough. Stand aside.

Judge Kennerly: The court invited us to renew our objections as to the admissibility of the certified copy of the deed from Felder to Daniels, and the deed from Felder to Smith. If the court has changed his mind by reason of subsequent testimony we would like to know it.

The Court: I adhere to the ruling and your exception may be noted.

Judge Kennerly: We wish to renew the motion for restitution. Motion denied and exception reserved.

Thereupon, on December 1, 1914, the plaintiffs and interveners, in open court, and while the jury was still at the bar, and before the court had charged the jury, and before the jury had retired to consider of its verdict, requested, in writing, the court to instruct the jury to return a verdict for plaintiffs and interveners.

Thereupon, the defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, on December 1, 1914, in open court, and while the jury was still at the bar, and before the court had instructed the jury, and before jury had retired to consider of its verdict, presented, in writing, to the court their twenty-six special requested charges, as follows:

Defendants' Special Requested Charge No. One Filed
Dec. 1, 1914, J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas. At Beaumont.

Cornelia G. Goodrich et als

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Now come the Houston Oil Company of Texas, the
Kirby Lumber Company and the Maryland Trust Company,
all being defendants herein, and request the court to charge
the jury as follows:

Gentlemen of the Jury:

You are instructed to render in this cause a verdict in
favor of the defendant, Houston Oil Company of Texas,
for all the land sued for and claimed by the plaintiffs and
the interveners in this cause, as the same is described in the
petitions of said plaintiffs and said interveners, and also that
the plaintiffs and interveners take nothing as against either of
the defendants, Kirby Lumber Company or the Maryland Trust
Company.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants, Houston
Oil Co. of Texas, Kirby Lum-
ber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. Two Filed
Dec. 1, 1914, J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas. At Beaumont.

Cornelia G. Goodrich et als

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are instructed that in determining the issue as to whether or not the purported deed from the said Charles A. Felder to the said John A. Veatch was in fact made and executed by the said Felder, or whether the same was a forgery, as claimed by the defendants herein, you may take into consideration the long claim of ownership asserted to the Felder league of land by the predecessors in title of the defendants and by defendants herein, if any, and the rendition of said land for taxes, if any, and payment of taxes thereon, if any, and the exercise of such acts of ownership as you shall find from the evidence the defendants herein and their predecessors in title exercised, if any, and also the course of dealing, that is to say the sales and transfers of said land among the defendants' predecessors in title, if any.

H. O. HEAD,
PARKER & KENNERLY,
Attorneys for Defendants, Houston
Oil Co. of Texas, Kirby Lumber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. Three Filed
Dec. 1, 1914, J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas. At Beaumont.

Cornelia G. Goodrich et als

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Defendants request the court to instruct the jury as follows:

Gentlemen of the Jury:

You are instructed that before plaintiffs and interveners can recover in this suit, they must show title in themselves to the land in controversy. A forged deed does not pass title to land in this state to the vendee named therein, nor to any persons claiming to deraign title from the vendee in such forged deed.

Therefore, if you shall believe from the evidence, that is to say from all the facts and circumstances which the court has permitted to be introduced before you, that the deed which has been offered in evidence by the plaintiffs and interveners, and which purports to have been executed by Charles A. Felder in favor of John A. Veatch on the 18th day of June, 1839, under which said deed both the plaintiffs and the interveners in this cause claim title, was not in fact executed by the said Charles A. Felder to the said John A. Veatch, but was a forgery, as claimed by the defendants in this cause, then, regardless of your findings on any other issue, you are instructed to proceed no further, but in such event let your verdict be in favor of the defendant, Houston Oil Company of Texas, for all the land sued for by both the plaintiffs and interveners, and that neither the plaintiffs nor the interveners take anything

as against either of the defendants herein. In this connection you are instructed that whether or not the said purported deed from the said Charles A. Felder to the said John A. Veatch was in fact made and executed by the said Felder to the said Veatch, or whether the same is a forgery, is a question of fact for you to determine from all the facts and circumstances in evidence before you.

H. O. HEAD,
PARKER & KENNERLY,
Attorneys for Defendants, Houston
Oil Co. of Texas, Kirby Lum-
ber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. Four Filed
Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas, et als.

Defendants request the court to give to the jury the fol-
lowing charge:

Gentlemen of the Jury:

If you find that a deed was made, executed and de-
livered by the said Charles A. Felder to the said William
A. Daniels, on the 10th day of June, 1839, conveying to said
Daniels the said Charles A. Felder league in Hardin County,
Texas, you are charged that the said Daniels would have been
entitled to have a reasonable time within which to present

same to the Clerk of the County Court of Liberty County for record. If you find, therefore, that said deed, if you find that such there was, was presented for record with the Clerk of the County Court of Liberty County within a reasonable time after its execution, if you find it was executed, you will find for defendants, and against plaintiffs and interveners, regardless of what your conclusions may be upon any other questions.

You are the judges of what would be a reasonable time, and in reaching a conclusion you may consider the distance between the place of the execution of said deed, if any, the means and manner of transportation, and the conditions of the country at the time of its execution, if you find it was executed.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants, Houston
Oil Co., of Texas, Kirby Lum-
ber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. Five. Filed
Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich, et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas, et als.

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are instructed that if you shall find from the evidence, that is such facts or circumstances as the court has permitted to go before you, that a deed from the said Charles A. Felder to the said William A. Daniels, dated June 10, 1839, conveying the Charles A. Felder league in Hardin County, Texas, had been executed and delivered, and had been presented to the Clerk of the County Court of Liberty County, Texas, for record, at or prior to the time the deed from the said Charles A. Felder to the John A. Veatch was executed, if it was executed, then you are instructed that the said John A. Veatch had constructive notice of the execution of the prior deed by the said Felder to the said Daniels, if you find that such a deed had been so executed, and that by the execution of the deed from the said Felder to the said Veatch, if the same was executed by the said Felder, no title passed to the said John A. Veatch, and in such event, if you so find the fact to be, your verdict must be in favor of all the defendants herein, as against both the plaintiffs and interveners.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants, Houston
Oil Co., of Texas, Kirby Lum-
ber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. Six. Filed Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy. In the District Court of the United States in and for the Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich, et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas, et als.

Defendants request the court to instruct the jury as follows:

Gentlemen of the Jury:

You are instructed that if you shall believe from the evidence that the purported deed from Charles A. Felder to John A. Veatch, bearing date June 18, 1839, under which the plaintiffs and interveners herein claim, was in fact made and executed by the said Felder to the said Veatch, yet, unless you shall further believe from the evidence that the plaintiffs or interveners have shown that at the time said deed from the said Felder to the said Veatch was executed, if it was, the deed from the said Felder to the said William A. Daniels, if you shall find that a deed was so made, executed and delivered by said Felder to said William A. Daniels, had not been presented to the Clerk of the County Court of Liberty County, Texas, for record, then you will let your verdict be in favor of all the defendants herein, and that neither the plaintiffs nor the interveners take anything by this suit.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants, Houston Oil Co., of Texas, Kirby Lumber Company, and Maryland Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. Seven. Filed Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy. In the District Court of the United States in and for the Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich, et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas, et als.

Defendants request the court to instruct the jury as follows:

Gentlemen of the Jury:

You are instructed that if you find that a deed was made and executed and delivered by Charles A. Felder to William A. Daniels on the 10th day of June, 1839, conveying the Charles A. Felder league in Hardin County, that the presumption is that said deed had been presented to the Clerk of the County Court of Liberty County, Texas, for record at the time the purported deed from Charles A. Felder to John A. Veatch was executed, if you find it was executed, and, therefore, unless it has been shown either by facts or circumstances before you that the said deed from the said Felder to the said William A. Daniels, if you find that there was such a deed, had not in fact been presented for record in said Liberty County, Texas, at the time of the execution of the deed from the said Felder to the said Veatch, if you find it was executed by the said Felder, then neither the plaintiffs nor the interveners can recover anything in this suit, and you will find for the defendant.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants, Houston Oil Co., of Texas, Kirby Lumber Company, and Maryland Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. Eight. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Defendants request the court to give to the jury the following charge:

Gentlemen of the Jury:

You are instructed that in reaching a conclusion as to whether Charles A. Felder did or did not on June 10, 1839, make, execute and deliver to William A. Daniels a deed conveying to the said William A. Daniels the Charles A. Felder league of land in Hardin County, Texas, a part of which is in controversy herein, which deed defendants claim to have been so made, executed and delivered, you may consider any claim of title, if any, occupancy, use and enjoyment, if any, of and on the land in controversy by defendants, and those under whom defendants claim, along with the fact that a deed purporting to have been executed by Charles Felder to William A. Daniels, and purporting to have been acknowledged by Charles A. Felder was spread upon the Deed Record book of Menard County, Texas, on the 23rd day of February, 1842, which record is in evidence before you, together with any other facts in evidence before you which may bear upon said issue.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants, Houston
Oil Co. of Texas, Kirby Lumber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL.

Defendants' Special Requested Charge No. Nine. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als

versus

C. L. No. 408.

Houston Oil Company of Texas et als.

The court is requested to instruct the jury as follows:

Gentlemen of the Jury:

You are instructed that it is claimed by the defendants in this cause that Charles A. Felder on the 10th day of June, 1839, made, executed and delivered to William A. Daniels a deed conveying to the said Daniels the Charles A. Felder league in Hardin County, Texas, a part of which league of land is in controversy herein, and it is a question of fact for you to determine whether such deed from the said Charles A. Felder to the said Wm. A. Daniels was in fact made, executed and delivered; You are instructed that the making, execution and delivery of a deed may be shown by circumstances. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury, and if you shall believe, upon a consideration of all the facts and circumstances in the case before you, that the circumstances are consistent with the inference or presumption that such a deed was made by the said Felder to the said Daniels, as claimed, and that in view of all the circumstances, it is more reasonably probable that such deed was made than that it was not, then the jury is at liberty, and it is the jury's duty to presume and find that such deed, as claimed, was in fact made, executed and delivered by the said Felder to the said Daniels, and to give the

same the effect to which it is entitled, as elsewhere explained in the court's charge.

H. O. HEAD,
PARKER & KENNERLY,
Attorneys for Defendants.

Refused.

GORDON RUSSELL
Judge.

Defendants' Special Requested Charge No. Ten. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are instructed that if you shall find that on the 10th day of June, 1839, Charles A. Felder, to whom the Felder league of land in Hardin County, Texas, was originally granted, made and executed a deed whereby the said Felder on that date conveyed to one William A. Daniels the said Felder league of land, neither the plaintiffs nor the interveners can recover any portion of the land as claimed by them, unless you shall believe from the facts and circumstances before you that the deed which has been read in evidence before you by the plaintiffs, purporting to have been executed by the said Charles A. Felder on the 18th day of June, 1839, in favor of one John A. Veatch was in fact made and executed by the said Charles A. Felder to the said John

A. Veatch, and unless you shall also further find and believe from the facts and circumstances in evidence before you that the said John A. Veatch did not have notice or knowledge at the time he took said deed from the said Felder, if he did, of the prior deed made by the said Felder to the said William A. Daniels, if you find it was so made, executed and delivered, and unless you further find that John A. Veatch paid to the said Felder for said land a valuable consideration.

H. O. HEAD
PARKER & KENNERLY
Attorneys for defendants, Houston
Oil Company of Texas, Kirby
Lumber Company, and Mary-
land Trust Company.

Refused

GORDON RUSSELL
Judge.

Defendants' Special Requested Charge No. Eleven. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als
versus C. L. No. 408.
Houston Oil Company of Texas et als.

Defendants request the court to charge the jury as fol-
lows:

Gentlemen of the Jury:

You are instructed that if you shall find that the pur-
ported deed from the said Charles A. Felder to the said John
A. Veatch was in fact executed by the said Charles A. Felder
to the said John A. Veatch, then in determining the issue of
whether or not the said John A. Veatch paid to the said

Charles A. Felder a valuable consideration for the said property, and whether the said John A. Veatch had notice of said deed from Charles A. Felder to the said William A. Daniels, if you find that such a deed was so executed, you may consider the claim of ownership asserted to the Felder league of land by the defendants and those under whom they claim herein, if any, and their rendition of said land for taxes, if any, and their payment of taxes thereon, if any, and the exercise of such acts of ownership as you shall find from the evidence that the defendants herein and those under whom they claim exercised, if any, claiming under the deed to the said William A. Daniels, if any, and also the course of dealing, that is to say the sales and transfers of said land, if any, among the defendants' predecessors in title.

H. O. HEAD

PARKER & KENNERLY

Attorneys for defendants, Houston
Oil Company of Texas, Kirby
Lumber Company and Mary-
land Trust Company.

Refused

GORDON RUSSELL

Judge.

Defendants' Special Requested Charge No. Twelve.
Filed Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas,
Deputy.

In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

The court is requested to instruct the jury as follows:
Gentlemen of the Jury:

You are instructed that it is claimed by the defendants
in this cause that Charles A. Felder on the 21st day of May,

1840, made, executed and delivered to Joshua Smith a deed conveying to the said Smith the Charles A. Felder league, in Hardin County a part of which league is in controversy herein. It is a question of fact for you to determine whether such deed from the said Felder to the said Smith was in fact made, executed and delivered. You are instructed that the making, execution and delivery of a deed may be shown by circumstances. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury, and if you shall believe, upon a consideration of all the facts and circumstances in the case before you that the circumstances are consistent with the inference or presumption that such a deed was made by the said Felder to the said Smith as claimed, and that in view of all the circumstances it is more reasonably probable that such deed was made than that it was not, then the jury is at liberty, and it is the jury's duty to presume and find that such deed, as claimed, was in fact made, executed and delivered by the said Felder to the said Smith and to give same the effect to which it is entitled as elsewhere explained in the court's charge.

H. O. HEAD

PARKER & KENNERLY,

Attorneys for defendants, Houston
Oil Company of Texas, Kirby
Lumber Company and Maryland
Trust Company.

Refused

GORDON RUSSELL,
Judge.

Defendants' Special Requested Charge No. 13. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als
vs. C. L. No. 408.
Houston Oil Company of Texas et als.

Defendants request the court to give to the jury the following charge:

Gentlemen of the Jury:

If you find that on the 21st day of May, 1840, Charles A. Felder made, executed and delivered to Joshua Smith, a deed of that date, conveying to him the Charles A. Felder league of land, a part of which is involved in this suit, then you are charged that same passed by a regular chain of title from Joshua Smith to John P. Irvin, who purchased same from George F. Moore, and wife, on August 4, 1881. You are further charged that same passed by regular chain of title from said Irvin to the Houston Oil Company of Texas, one of the defendants herein.

Defendants claim that said John P. Irvin was a bona fide innocent purchaser for value of said league of land without notice of the deed from Charles A. Felder to John A. Veatch, if such a deed there was.

If you find therefore that at the time said John P. Irvin purchased said league of land from George F. Moore and wife he purchased same in good faith, and paid value therefor, and that at said time he had no notice of the alleged deed from Charles A. Felder to the said John A. Veatch, if you find there was such a deed, or of the alleged title or claim thereunder, you will find for defendants and against plain-

tiffs and interveners and this was without regard to your finding on any other issue submitted to you.

H. O. HEAD
PARKER & KENNERLY

Attorneys for defendants, Houston
Oil Company of Texas, Kirby
Lumber Company and Maryland
Trust Company.

Refused

GORDON RUSSELL
Judge.

Defendants' Special Requested Charge No. 14. Filed Dec.
1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States in and for the East-
ern District of Texas, at Beaumont.

Cornelia G. Goodrich et als.,

vs. *

C. L. No. 408.

Houston Oil Company of Texas, et als.

Defendants request the court to charge the jury as fol-
lows:

Gentlemen of the Jury:

You are instructed that in reaching a conclusion as to whether Charles A. Felder did or did not on the 21st day of May, 1840, make, execute and deliver to Joshua Smith the Charles A. Felder league in Hardin County, Texas, a part of which is in controversy herein, which deed defendants claim to have been so made, executed and delivered, you may consider any claim of title, if any, payment of taxes, if any, rendition for taxes, if any, occupancy, use and enjoyment, if any, of and on the land in controversy by the defendants and those under whom defendants claim, you may also consider in this connection the fact that a deed purporting to be dated May

21, 1840, and purporting to have been signed by Charles F. Felder was spread upon the records of Menard County on the 22nd day of March, 1841.

H. O. HEAD,
PARKER & KENNERLY,
Attorneys for Defendants, Houston
Oil Company of Texas, Kirby
Lumber Company and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 15. Filed Dec.
1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States for the Eastern
District of Texas, at Beaumont.

Cornelia G. Goodrich et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are instructed that among other defenses interposed by the defendants herein, is the statute of limitation of three years, which defense is interposed as against both the plaintiffs and the interveners, and as to this defense you are instructed as follows:

The statute of this state provides that every suit to be instituted to recover land in this state as against any person in peaceable and adverse possession thereof under title or color of title shall be instituted within three years next after the cause of action shall have accrued and not afterward.

By the term "title" as used above, is meant a regular chain, of transfer from or under the sovereignty of soil, and by "color of title" is meant a consecutive chain of such transfers down to such person in possession, without being regular, as if one or more of the memorials be only in writing or such like defect as may not extend to or include the want of intrinsic fairness and honesty.

"Peaceable possession" as used above, is such as is continuous for a period of three years, and not interrupted by adverse suit during such period of three years to recover the land.

"Adverse possession" is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession of land need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them; but in this connection you are instructed that in order to constitute the peaceable and adverse possession above defined, it is not required that the person or persons to whom the deed or deeds are made for the land shall actually be in possession thereof in his own proper person, but it is sufficient to constitute possession if the same is held by an agent or representative or tenant of such persons claiming the land by deed, and that such holding by such agent, representative or tenant is for the person or persons claiming the land under such deed or deeds.

Therefore, if you shall believe from the evidence that the defendant, Houston Oil Company of Texas, or any person or persons under whom it claims by privity, as shown by deeds introduced in evidence, before you, or any two or more

of them, by an agent, representative or tenant was in peaceable and adverse possession of the Charles A. Felder league of land in Hardin County, Texas, for a period of three successive years at any time before this suit was filed, which was on the 7th day of June, 1911, and that such defendant, Houston Oil Company of Texas, or its predecessors in title during said time were claiming said league of land, or the 2578 acres thereof involved in this suit, under said deed or deeds, then you are instructed to find in favor of the defendant, Houston Oil Company of Texas, for all of the land sued for by the plaintiffs and interveners herein.

H. O. HEAD and
PARKER & KENNERLY,

Attorneys for Defendants, Houston
Oil Company of Texas, Kirby
Lumber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 16. Filed Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States for the Eastern
District of Texas, at Beaumont.

Cornelia G. Goodrich et als.

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Defendants request the court to charge the jury as follows:

The statutes of this state provide that any person who has the right of action for the recovery of any land against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit

therefor within ten years next after his cause of action therefor shall have accrued, and not afterward.

Therefore, if you shall believe from the evidence before you that the defendant Houston Oil Company of Texas or the Texas Pine Land Association, or both of them together, had and held peaceable and adverse possession of the Feldier league of land, by or through another, as agent, employe, or tenant, and that such possession continued for as long a period of time as ten consecutive years, cultivating, using or enjoying the same, then neither the plaintiffs nor the interveners can recover anything in this suit, and if you so find the facts to be, your verdict will be for the defendants.

H. O. HEAD and
PARKER & KENNERLY,
Attorneys for defendants, Houston
Oil Company of Texas, Kirby
Lumber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 17. Filed Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States in and for the Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

The defendants request the court to instruct the jury as follows:

Gentlemen of the Jury:

You are instructed that among other defenses interposed by the defendants herein as against the plaintiffs and the in-

terveners is the statute of limitation of five years, and with reference to this defense you are instructed as follows:

The statute of this state provides that every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards.

By the expression "peaceable possession" is meant such possession as is continuous for a period of five years, and not interrupted during such period by adverse suit to recover the land.

"Adverse possession" is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person in order to give title to land by limitation, but when held by different persons successively, there must be a privity of estate between them.

You are further instructed in this connection to constitute the peaceable and adverse possession above defined, it is not necessary or required that the person or persons to whom the deed or deeds for the land is made shall in his own proper person actually occupy the land, but the same may be held and occupied by an agent, representative, employe or a tenant of such person or persons claiming the land under such deed or deeds duly registered.

Therefore, if you shall believe from the evidence that the defendant, Houston Oil Company of Texas, or any person or persons under whom it claims by privity, or any two or

more of them, was in peaceable and adverse possession of the Charles A. Felder league of land in Hardin County, Texas, or the 2578 acres thereof involved in this suit, by an agent, representative, employe or tenant, cultivating, using or enjoying the same, and paying taxes thereon and claiming the same under a deed or deeds duly registered for a period of five years at any time before this suit was filed, which was on the 7th day of June, 1911, then you are instructed that neither the plaintiffs nor the interveners can recover any portion of the land sued for by them, and you will find for defendants.

H. O. HEAD and
PARKER & KENNERLY,
Attorneys for Defendants, Houston
Oil Company of Texas, Kirby
Lumber Company of Texas and
Maryland Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 18. Filed
Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas.

Gentlemen of the Jury:

You are instructed that it is claimed by the defendants in this cause as against the interveners only that James Morgan on the 21st day of November, 1844, executed and delivered to one William W. Swain, a deed conveying to the said Swain 2578 acres of land out of the said Charles A. Felder league,

being the same land that is in controversy herein. You are instructed that neither the deed nor a certified copy from the said Morgan to the said Swain so claimed to have been executed and delivered has been introduced in evidence before you, and it is therefore a question of fact for you to determine whether such deed from the said Morgan to the said Swain was in fact made and delivered; and in this connection you are instructed that the execution and delivery of a deed may be shown by circumstances, if in the opinion of the jury such circumstances bearing on that issue are sufficiently strong to show such fact and the jury is at liberty to determine whether they will indulge the presumption that a deed was in fact executed and delivered by the said James Morgan to the said William W. Swain, conveying said land to the said Swain. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury; and in this connection you are instructed that if you shall believe, upon a consideration of all the facts and circumstances in the case before you (those which the jury may believe to repel, as well as those which the jury may believe to favor such presumption), that the circumstances are consistent with the inference or presumption that such a deed was made by the said Morgan to the said Swain as claimed, and that in view of all the circumstances it is more reasonably probable that such deed was made than that it was not, then the jury is at liberty to presume and find that such deed, as claimed, was in fact made and delivered by the said Morgan to the said Swain; and if the jury, deciding the issues in favor of the weight of the evidence on this point, to be determined by them, do so presume and find, then you are instructed that the interveners herein

can recover nothing in this suit, and in such event you will find that the interveners take nothing herein, and this will be so without regard to the other issues submitted herein, and also without regard to what your verdict shall be as between the plaintiffs and the defendants herein.

H. O. HEAD and
PARKER & KENNERLY,
Attorneys for Defendants, Houston
Oil Company of Texas, Kirby
Lumber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 19. Filed
Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Defendants request the court to give to the jury the following instruction:

Gentlemen of the Jury:

You are instructed that where one has actual possession of any part of a tract of land claimed by him, by virtue of a deed or other writing, though not in actual possession of the entire tract conveyed by said deed, still, in law, his possession of a part of the same is the possession of all of said tract so described in his deed.

Therefore, if from the evidence you believe that the Houston Oil Company of Texas, or those under whom it claims, claimed all of the land in controversy under and by virtue

of a deed or deeds or other writings, and so claiming all of the land in controversy, entered into and upon and took possession of a part of said land such possession of a part thereof would, in law, be a possession to the extent of the land described in said deed or deeds, and such possession, if any, would be co-extensive with the boundaries designated in such deed or deeds.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants, Houston
Oil Company of Texas, Kirby
Lumber Company and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 20. Filed
Dec. 1, 1914. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als.,

vs.

C. L. No. 408.

Houston Oil Company of Texas et als.

Defendants request the court to instruct the jury as follows:

Gentlemen of the Jury:

You are instructed that if you believe from the evidence that the Houston Oil Company of Texas or those under whom it claims, claimed the Charles A. Felder league, or the 2578 acres thereof in controversy herein, by virtue of a deed or deeds, and you further believe from the evidence that while so claiming under said deed or deeds, if any, it, they or their agents, tenants or lessees, if any, entered into and upon, and

reduced to possession, a part of said land, then you are instructed further that such possession, if any, of said Houston Oil Company of Texas, or those under whom it claims, of a part of said land, in law would be the possession of the whole of said land so claimed by it or them under and by virtue of said deeds to it or them, if any.

H. O. HEAD,
PARKER & KENNERLY,
Attorneys for Defendants, Houston
Oil Company of Texas, Kirby
Lumber Company and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 21. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als

versus

C. L. No. 408.

Houston Oil Company of Texas et als

Defendants request the court to give to the jury the following instruction:

Gentlemen of the Jury:

You are instructed that a party in possession of land, either in person or by his agent, tenant or lessee, holds to the extent of the boundaries of the land described in his deed, when he holds and claims under and by virtue of a deed or deeds, describing such tract of land so claimed by him.

H. O. HEAD,
PARKER & KENNERLY,
Attorneys for Defendants, Houston
Oil Company of Texas, Kirby
Lumber Company and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special requested Charge No. 22. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.
In the District Court of the United States in and for the
Eastern District of Texas; at Beaumont.

Cornelia G. Goodrich et al

versus

No. 408.

Houston Oil Co Company of Texas et al

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are instructed that, under the contract or contracts, if any, between the Houston Oil Company of Texas and the Texas Builders Supply Company as shown by the evidence before you, an entry under said contract or contracts, if any, upon said land in controversy herein and use thereof, if any, by said Texas Builders Supply Company was, in law, an entry upon and use of said land by said Houston Oil Company of Texas;

And you are further instructed that if you believe, from the evidence before you, that the Texas Builders Supply Company, under said contract or contracts, if any, did enter upon the land in controversy herein, and did remove sand therefrom, or did otherwise use or enjoy same, such acts, if any, in removing sand or otherwise using or enjoying said land, would, if continued for the proper length of time, under a claim of right and ownership, as elsewhere explained to you in this charge, be sufficient to constitute title in favor of defendant Houston Oil Company of Texas; and you should find for the defendants.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants Houston
Oil Company of Texas, Kirby
Lumber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 23. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States in and for the
Eastern District of Texas; at Beaumont.

Cornelia G. Goodrich et al

versus

No. 408.

Houston Oil Company of Texas et al

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are instructed that, under the contract or contracts, if any, between the Texas Pine Land Association and the Gulf, Beaumont and Kansas City Railroad Company as shown by the evidence before you, an entry under said contract or contracts, if any, upon said land in controversy herein and use thereof, if any, by said Gulf, Beaumont and Kansas City Railroad Company was, in law, an entry upon and use of said land by said Texas Pine Land Association;

And you are further instructed that if you believe, from the evidence before you, that the Gulf, Beaumont, and Kansas City Railroad Company, under said contract or contracts, if any, did enter upon the land in controversy herein, and did remove sand therefrom, or did otherwise use or enjoy same, such acts, if any, in removing sand or otherwise using or enjoying said land, would, if continued for the proper length of time, under a claim of right and ownership, as elsewhere explained to you in this charge, be sufficient to constitute title in favor of defendant Houston Oil Company of Texas; and you should find for the defendants.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for Defendants Houston
Oil Company of Texas, Kirby
Lumber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 24. Filed Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy. In the District Court of the United States in and for the Eastern District of Texas; at Beaumont.

Cornelia G. Goodrich et al

versus

No. 408.

Houston Oil Company of Texas et al

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are instructed that, under the contract or contracts, if any, between the Texas Pine Land Association and the Gulf, Colorado and Santa Fe Railway Company as shown by the evidence before you, an entry under said contract or contracts, if any, upon said land in controversy herein and use thereof, if any, by said Gulf, Colorado and Santa Fe Railway Company was, in law, an entry upon and use of said land by said Texas Pine Land Association;

And you are further instructed that if you believe, from the evidence before you, that the Gulf, Colorado, and Santa Fe Railway Company, under said contract or contracts, if any, did enter upon the land in controversy herein, and did remove sand therefrom, or did otherwise use or enjoy same, such acts, if any, in removing sand or otherwise using or enjoying said land, would, if continued for the proper length of time, under a claim of right and ownership, as elsewhere explained to you in this charge, be sufficient to constitute title in favor of defendant Houston Oil Company of Texas; and you should find for the defendants.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for, Defendants Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 25. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States in and for the
Eastern District of Texas; at Beaumont.

Cornelia G. Goodrich et al

versus

No. 408.

Houston Oil Company of Texas et al

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are instructed that, under the contract or contracts, if any, between the Houston Oil Company of Texas and the Gulf, Colorado and Santa Fe Railway Company as shown by the evidence before you, an entry under said contract or contracts, if any, upon said land in controversy herein and use thereof, if any, by said Gulf, Colorado and Santa Fe Railway Company was, in law, an entry upon and use of said land by said Houston Oil Company of Texas;

And you are further instructed that if you believe, from the evidence before you, that the Gulf, Colorado and Santa Fe Railway Company, under said contract or contracts, if any, did enter upon the land in controversy herein, and did remove sand therefrom, or did otherwise use or enjoy same, such acts, if any, in removing sand or otherwise using or enjoying said land, would, if continued for the proper length of time, under a claim of right and ownership, as elsewhere explained to you in this charge, be sufficient to constitute title in favor of defendant Houston Oil Company of Texas; and you should find for the defendants.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for defendants Houston
Oil Company of Texas, Kirby
Lumber Company, and Maryland
Trust Company.

Refused.

GORDON RUSSELL, Judge.

Defendants' Special Requested Charge No. 26. Filed
Dec 1 1914 J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

In the District Court of the United States in and for the
Eastern District of Texas; at Beaumont.

Cornelia G. Goodrich et al

vs

No. 408. D. L.

Houston Oil Company of Texas et al

Defendants request the court to charge the jury as follows:

Gentlemen of the Jury:

You are charged that under the evidence offered in this case the plaintiff Mary W. Montgomery and her husband E. L. Montgomery have not shown themselves entitled to recover against defendants herein, and you will return your verdict that said Mary W. Montgomery and her husband E. L. Montgomery take nothing, and this without regard to what your findings may be on any other issue in the case, or as to any other party to the suit.

H. O. HEAD,

PARKER & KENNERLY,

Attorneys for the Defendants Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, Trustee.

Refused.

GORDON RUSSELL, Judge.

Thereupon, the court invited argument and explanations from counsel as to the reasons for desiring and requesting the special charges so requested both by plaintiffs and interveners and by said defendants, allotting to each side two hours in which to give their reasons for the charges so requested and for the discussion of what should be included in the court's

charge to the jury. Thereupon, counsel for both plaintiffs and interveners, and for defendants, fully and in detail during the time allotted explained to the court and discussed before the court various issues in the case, together with the reasons for requesting such special charges. And the court, having fully considered said special charges, and fully examined same, and having fully considered the reasons and argument advanced by the respective parties in interest of such special charges, and having fully considered all the issues in the case, in open court before the jury had been instructed, and while the jury was still at the bar, and before the jury had retired to consider of its verdict, refused to give to the jury the special charge requested by the plaintiffs and interveners, and refused to give to the jury each and all of the charges requested by defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, as above set forth, and in open court endorsed his refusal on such special charges. To which action of the court, in refusing their special charge requested, the plaintiffs and interveners in open court excepted, for the reasons fully set forth in the explanation of such special charge given the court in their argument thereon. And in open court the defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, excepted to the action of the court, in refusing each and all of their special requested charges so refused, for the reasons fully set forth in the explanation and argument of counsel in support thereof made at the bar of the court. All of which was done in open court while the jury was still at the bar, and before it had retired to consider of its verdict, and before the court had charged the jury.

Thereupon, the court orally charged the jury as follows:

Gentlemen of the Jury:

The court has endeavored to go through the case during the recess since yesterday afternoon, and has endeavored to simplify the issues to be submitted to the jury in the discharge of their duties with regard to the facts. I have concluded from an investigation of the matter to leave to the jury only one issue of fact to be settled by them, and that is to determine from the testimony before you whether the defendants have established title to the land by a preponderance of the evidence under the five years statute of limitation. It will be the duty of the jury, in the event you fail to find that defendants have established their right to recover under the five years statute of limitations, to return a verdict for the plaintiffs and interveners.

In the outset of the case it was contended by the defendants that the plaintiffs' title should fail because of the fact, as alleged by them, that the deed from Charles A. Felder to John A. Veatch was a forgery, and it is the contention of counsel for the defendants that I should submit that matter to the jury. I do not believe there is any issue of fact on the execution of the deed from Charles A. Felder to John A. Veatch sufficient to raise a question as to its genuineness serious enough to cause the jury to have to pass on it. The deed from Charles A. Felder to John A. Veatch bears date June 18, 1839. It is more than thirty years old. In fact the deed shows on its face at this time to be more than seventy-five years old. In the second place, the deed shows to have been properly acknowledged before an officer authorized to take acknowledgements on the date of its execution, to wit: June

18, 1839. In the third place, the deed was filed and tendered for record on the 21st day of October, 1839. In the fourth place, the original deed was found among the papers of William Walker, who is shown to have died on Long Island very many years ago. Among his papers was found, not only the original deed from Felder to Veatch, but other deeds passing title to a portion of the land to the man William Walker. Another significant thing to my mind is the fact that there was found among the papers of Walker the original Spanish grant from the Mexican Government to Charles A. Felder, as well as the original deed from Charles A. Felder to John A. Veatch, and deeds from Veatch and other grantors on down to William Walker, and these deeds all recite the fact that Charles A. Felder had conveyed the land to Veatch by deed dated June 18, 1839. It is further shown that John A. Veatch did live in Texas, and in the vicinity where the land was located, before the time of the execution of the deed, at the time of its execution and for some time subsequent to its execution in 1839, and the deed and the Spanish grant were found in the possession of the heirs of William Walker who had obtained title to a portion of the land. It is further shown that John A. Veatch was a man of most excellent reputation. His life has been traced through people who knew him in the early days and people who became acquainted with him in Oregon after he moved from Texas. It is further in evidence that the reputation of John Bevil, the man who took the acknowledgement to the deed from Charles A. Felder to John A. Veatch on June 18, 1839, was a man of excellent reputation. In addition to that, there is evidence of the assertion of ownership under that title by the parties. Perhaps I have not enumerated all the facts in connection with this

branch of the case, but they will be fully shown by the record. They all tend strongly to show that Charles A. Felder executed the deed to John A. Veatch and delivered it. On the other hand, the facts assailing the genuineness of the deed are extremely meager. The defendants rely on the similarity of the handwriting in the deed from Felder to Veatch, together with a letter claimed to have been written by Veatch to Borden, and the similarity of the writing which they claim was written by Veatch, to the name Felder signed to the deed from Felder to Veatch, contending thereby that taking the writing signed to the application for the grant, and the writing of the name signed to the body of the deed from Felder to Veatch and the letter written to Borden show that one man wrote them all, and their contention is that John A. Veatch wrote them all. The law did not require Felder to sign the application for the grant in person. He may have given the right to sign it to some one else. There is one significant thing to the mind of the court in reference to the letter written by Veatch to Borden, and that is that the letter carries on its face the idea that he was a man of sensitive honor and jealous of his reputation, because the moment he heard that he was accused of attempting to secure two headrights, he addressed a letter to the officer at Austin, calling attention to the fact that there were two Veatches, one spelled Veatch and the other Veitch, and that there was an attempt to impugn his integrity by confusing him with the other man of similar name, and he invites an investigation as to his own character, and among others, he refers the officer to Sam Houston and Thomas J. Rusk. The letter show on its face that there was nothing in his life he was trying to conceal. The circumstances assailing the deed from Felder to Veatch, in the face

of the overwhelming testimony as to the genuineness of the deed, are to my mind too meager to justify the submission of that as an issue for the determination of the jury. Therefore, the court is of opinion that the plaintiffs and interveners are entitled to recover the land in controversy in this suit, unless the jury should find title to be in the defendants under the five years statute of limitation, and that is the sole and only issue I submit to the jury for the purpose of having them find upon that issue.

The law provides:

"Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterward."

A subsequent section provides:

"Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims."

The elements necessary to be shown under the five years statute of limitations, are: First, peaceable possession; second, adverse possession; third, cultivating, using or enjoying the land; fourth, the payment of taxes; and, fifth, claiming under a deed or deeds duly registered. All these elements must concur in order to establish title under the five years statute of limitation against the true owner of the land. Cultivation,

use *and* enjoyment need not be shown, but there must be either cultivation, use *or* enjoyment under a deed or deeds duly registered, and payment of taxes must be shown, accompanied by peaceable and adverse possession.

The law has not left us in the dark as to what it takes to constitute "peaceable possession," and the statute defines peaceable possession in the following language:

"Peaceable possession within the meaning of this chapter, is such as is continuous and not interrupted by adverse suit to recover the estate."

The possession must be continuous for the full period of five years. There must be no interruption of the possession by adverse suit to recover the estate. The possession must be continuous during the full period necessary to establish title under the five years statute of limitation. An occasional occupancy, use or possession of the land would not be sufficient, therefore, to establish title under the five years statute of limitation. There must be no break in the possession of the claimant, or his tenant or agent, in possession, because if there is a break or interruption in the possession, title will not mature, but possession for the full period of five consecutive years must be proven in order to establish title under the five years statute of limitation. If the occupancy is simply a casual or an occasional occupancy, that would not constitute a continuous possession, and would not meet the requirements of the law. In this case it is contended that the possession consisted of the selling of timber and the taking of sand from the land. If the taking of the sand was an occasional or casual taking, this would not be sufficient possession to mature a title under the five years statute of limitation. It would

not be necessary in order to constitute title under the five years statute of limitation that the sand should be continuously and constantly loaded, but it would be necessary for the occupancy, either by the taking of sand, or in some other way to manifest a continuous possession and occupancy of the land by claiming adverse to and hostile to the true owner of the land. Unless this is shown for a full period of five years, there could be no peaceable possession under the statute, and therefore that element of the title by limitation would be wanting. There is another element that must concur with those I have named to you. The possession must not only be a peaceable possession, but it must be an adverse possession. I will read in your hearing the section of the statute defining "adverse possession."

"Adverse possession is an actual and visible appropriation of the land commenced and continued under a claim of right inconsistent with and hostile to the claim of another."

That is the statutory definition of adverse possession, and that is an element which must be shown before a party can claim land against the true owner under the five years statute of limitation. It follows necessarily from the definitions that the peaceable and adverse possession must be open and plain, and evidence an intention upon the part of the claimant to claim the land adversely against the whole world. It is true that the possession may be by tenant or in person, and the claimant does not necessarily have to occupy the land in person, but possession may be held by a representative, agent or tenant, but whether in person or by agent, representative or tenant, it must be of such character to show that the claimant himself

in person, or by his agent, representative or tenant, has kept his flag flying—that is, he must have exercised such acts of dominion over the land as evinces an intention to claim it adversely, and where it falls short of such adverse possession, the claimant would not be entitled to recover under the five years statute of limitation. The possession must be such that the true owner of the land, if a reasonably prudent person, could by the acts of dominion have notice of the fact that the land was being held adversely to him by another. The possession need not be in the same person, but where held by different persons, their possessions must be continuous for the full period of five years, and there must be no interruption or break in the possessions.

Now, if the possession in this case should consist in the taking of sand, and the jury should find from the evidence that it was the intention of the claimant in putting some one in possession to take the sand to occupy no more of the land than necessary to take the sand and had no intention by that possession to assert title to the whole tract, such an act of possession would not be sufficient to mature title by the five years statute of limitation. On the other hand, I will give you the converse of the proposition: If the claimant in putting some one in possession for the purpose of taking the sand from the land, intended to claim title to all the land and to assert title and dominion over all of it by taking the sand even from a limited portion of the land, then under such circumstances, if the other elements appear, and the claimant had occupied the land under the statute for the full term of five years, the jury would be justified in finding a verdict for the defendant. The mere going upon the land for the purpose of taking the sand, and the occupancy of no more than sufficient of it to take the sand, would not justify the jury in find-

ing under those circumstances the possession of the whole tract, and therefore that limitation extended to the whole tract.

The defendants claim two kinds of possession. First: Possession by the Gulf, Beaumont & Kansas City Railway Company. The jury will find these important questions will have to be determined by you in ascertaining whether the facts are sufficient to give the defendants in this case title to the land in controversy: First, was it sufficient to put the true owner on notice that the claimant was intending to assert title, occupancy and possession to the 2578 acres through the acts of dominion exercised by the railway company; second, were the acts of dominion and possession shown to have been exercised by the Gulf, Beaumont & Kansas City Railway Company sufficient to show adverse and hostile claim upon the part of the claimant or such representative as he put in possession of the land? Third, was the possession of the Gulf, Beaumont & Kansas City Railway Company sufficiently continuous and hostile and adverse in its character to visit notice upon a reasonably prudent man holding adversely to the occupant in possession of the portion used by the Gulf, Beaumont & Kansas City Railway Company. Those are the important facts to be determined by the jury in connection with the possession of the Gulf, Beaumont & Kansas City Railway Company. If the jury should determine that the acts of dominion and ownership exercised by the Gulf, Beaumont & Kansas City Railway Company over the land where sufficient to show adverse and hostile claim upon the part of the claimant to the entire tract of land, and so open, hostile and notorious as to visit upon a reasonably prudent man that the claimant was holding it adversely against the true owner and against

the whole world, and the acts of dominion were such to show that the adverse claimant kept his flag flying for the full period of five years, and the possession was continuous for the full period of five years, accompanied by the other elements necessary to mature title, to-wit: Claiming under deed or deeds duly registered, and the payment of taxes, then the jury would be justified in finding a verdict for the defendants, but unless the evidence meets those requirements, you could not find that title had been perfected under the five years statute of limitation through the occupancy of the Gulf, Beaumont & Kansas City Railway Company.

There is another possession relied on by the defendants, and that is the possession of the Texas Builders Supply Company, who claim to have been in possession under certain contracts. Those contracts have been offered in evidence before the jury. I call your attention to these contracts because it is necessary for the jury to understand them in determining whether the possession of the Texas Builders Supply Company was such possession as would give title to the land under the five years statute of limitation.

The second clause in the first contract between the Houston Oil Company and the Texas Builders Supply Company, under date of October 16, 1902, uses this language:

"That, whereas, first party is the owner of a certain sand pit at the station of Fletcher in Hardin County, Texas, on the line of the Gulf Beaumont & Kansas City Railway Company, said pit being known as Pit F, and is willing to sell sand out of said pit to second party, and second party is desirous of purchasing sand from said pit of first party, under the terms of this contract."

It is my purpose to read only such portions of the contract as are necessary to identify the land which the Texas Builders Supply Company occupied. A subsequent clause of the contract uses this language:

"First party hereby agrees to sell to second party sand out of said Pit F at Two and 25/100 (\$2.25) dollars for each coal car and One and 25/100 (\$1.25) Dollars for each flat car; and said sand shall be mined and loaded at the expense of second party."

Further along in the contract this language is used:

"And it is further provided that said second party shall have the right to purchase, load and haul out from said sand Pit F as much sand as they may desire during the life of this contract; and any excess above \$50.00 worth at the rates aforesaid which second party may load and haul during any month shall be paid for not later than the 5th of the next following month at the rates aforesaid."

Further along this contract reads:

"It is understood that during the life of this contract second party shall have the exclusive right to load and haul sand out of said Pit F with the exception that the Kirby Lumber Company has the concurrent right to haul all the sand from said pit F which may be desired by said Kirby Lumber Company for its own use, and said second party hereby agrees that it will load and ship for the Kirby Lumber Company all the sand it may desire for its own use from said Pit F during the life of this contract and charge the Kirby Lumber Company therefor," etc.

Later, on the 27th of May, 1903, the Houston Oil Company of Texas entered into a contract with the Texas Builders Supply Company, and in describing the land to be occupied by the Texas Builders Supply Company, used this language:

"Whereas, the said Oil Company is the owner of a certain sand pit at the station of Fletcher in Hardin County, Texas, on the line of the Gulf, Beaumont & Kansas City Railway Company, said sand pit being known as pit 'F' and is willing to sell sand out of said sand pit to said Supply Company, and said Supply Company is desirous of purchasing sand from said pit from said Oil Company."

Then follows a number of clauses containing the contract between the Texas Builders Supply Company and the Houston Oil Company, but in the entire contract the portion of the land which the Texas Builders Supply Company is to work is described as "Sand Pit F" at the station of Fletcher in Hardin County, Texas, on the line of the Gulf, Beaumont & Kansas City Railway Company.

It becomes, therefore, a matter for the jury to determine from the testimony, as well as from the contracts, what was meant to be included in "Sand Pit F." You have heard the testimony and have heard the contracts, and it is your duty to determine how much land was included in "Sand Pit F." Was it the intention of the parties to simply put the Texas Builders Supply Company in possession of a limited or restricted portion of the land to take sand from it and sell it and use it, without intending to put them in possession of the whole tract of land? If that was the intention, then the possession of the Texas Builders Supply Company would not give

the defendants title to any of the land under the five years statute of limitation. On the other hand, if the purpose of the parties was that the Texas Builders Supply Company should take possession of a limited portion of the land, and it was the purpose of the parties in that way through the occupancy by the Texas Builders Supply Company for the Houston Oil Company of Texas, to assert adverse title against the true owner as well as against the whole world to the entire tract, the title would mature under the five years statute of limitation, and this was accompanied by a claim under deed or deeds duly registered and the payment of taxes, as the statute provides, even though a less portion of the land than the whole tract was occupied by the tenant. The question for the jury to determine from all the evidence in this case, as well as from the contracts read in evidence, is, did the parties by putting the Texas Builders Supply Company on the land, intend to put that company in possession of the entire tract, even though they actually occupied only a small portion thereof, and in that way assert a hostile and adverse claim to the entire tract, and, if so, was their occupancy in this way continuous for the full period of five years, accompanied by a claim under deed or deeds duly registered by the Houston Oil Company and the payment of taxes? If so, such occupancy would mature title to the Houston Oil Company of Texas to the entire tract under the five years statute of limitation. Upon the other hand, if the purpose of the parties was not to assert title to the entire tract, but simply to give the Texas Builders Supply Company the occupancy of a limited portion, known as "Sand Pit F" for the purpose of taking sand therefrom, and such occupancy by the Texas Builders Supply Company, under those circumstances, was not intended as an assertion of

title to the entire tract, then this would not give the defendants title under the five years statute of limitation. It will be the duty of the jury to determine whether the Houston Oil Company, or those whose interest and estate to the land they claim, have had peaceable and adverse possession of the land in controversy, using, cultivating or enjoying the same, and paying taxes thereon, and claiming the same under a deed or deeds duly registered for the full period of five years during any time prior to the institution of this suit. If you find this to be the case, you will return a verdict for the defendants. If you fail to so find and fail to find from the testimony that the Houston Oil Company has established its title under the five years statute of limitation, as the court has explained to you, then, the plaintiffs and interveners having a valid legal title, would be entitled to a verdict at your hands.

Mr. Gordon: The plaintiffs and interveners desire to except to the charge of the court in that the undisputed evidence in the case shows that defendants deraigned title under forged deeds, and therefore cannot avail themselves of the five years statute of limitation.

They also except to the court's refusal to give a directed verdict, as requested by the plaintiffs and interveners, on the ground that the undisputed proof failed to raise the issue of the five years statute of limitation in this: There is no sufficient proof of a visible occupancy of the land in such continuity and for such period of time as would amount to notice to the true owner, and, further, because it is shown by the record that the defendants are holding under forged deeds, and cannot avail themselves of the five years statute of limita-

tion; and, further, because the undisputed proof shows that during the whole period of the alleged occupancy by the defendants they were not in exclusive possession in that other persons were on said survey of land as occupants and not claiming under the Houston Oil Company and its predecessors in title but affirmatively shows that they were claiming for themselves. And for the further reason that the undisputed proof shows was limited in area, not exceeding eight or nine acres. And further because the undisputed proof shows that up to the occupancy by the Texas Builders Supply Co. there was no concurrent payment of taxes for five years.

We also except to the court's charge wherein he tells the jury in substance that if the Texas Builders Supply Co. were in the occupancy of any part of the survey with the right to use all the survey, the defendants could recover. We now request the court to charge the jury that if the defendants would, in the absence of the statute of limitations have de-raigned title under a forged deed or deeds, or if they were claiming title to the land under a forged deed or deeds, they could not avail themselves of the five years statute of limitation.

Judge Kennerly: We except to the failure of the court to give the requested instructions numbered from one to twenty-six, presented to the court before the argument was begun and the charge delivered, and filed with the clerk of the court to which reference is made.

We except because the court in his charge does not embody the matters and things set forth in special requested charges numbered from one to twenty-six above referred to.

We except to the charge of the court in that said charge instructs the jury that the deed from Charles A. Felder to John A. Veatch is established by the evidence, and refusing to submit to the jury the issue of the forgery of said deed.

Thereupon, and after delivery of such charge and after the making of their exceptions in open court by the plaintiffs and interveners and by defendants, as hereinbefore set forth, the jury retired in charge of the proper officer to consider of its verdict, and afterwards returned into open court the verdict quoted in the judgment of the court, hereinafter given.

Thereupon, judgment and the exceptions of defendants thereto were entered by the court, as follows:

In the District Court of the United States for the Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et al.,

vs.

D. L. No. 408.

Houston Oil Company of Texas et al.

JUDGMENT

Entered Dec. 1st, 1914.

On the 20th day of November, 1914, at a regular term of this court, the above numbered and entitled cause was called for trial. Thereupon, the plaintiffs and interveners say they will not longer prosecute their suit against the defendant J. H. Cook and said defendant Cook declines further to prosecute his cross-action for the recovery sought by him in his answer herein.

It is therefore ordered and adjudged by the court that the cause of action of both the plaintiffs and interveners against the defendant Cook, as well as the cross-action of said defendant, be dismissed without prejudice to either party, and that the said defendant Cook recover of plaintiffs and the interveners his costs in this behalf expended.

And thereupon defendants Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Com-

pany announced to the court that they and each of them would no longer prosecute that part of their cross-action herein which seeks to recover damages for timber cut and for sand removed or other damages or rents against the plaintiffs or the interveners, or any other party to this suit; and it is ordered that same be, and is hereby dismissed without prejudice.

And thereupon all parties to said suit, plaintiffs, interveners and defendants, announced ready for trial, and then came a jury of good and lawful men, to-wit: J. W. Goldsberry, foreman, and eleven others, who were duly selected, empaneled and sworn as the law directs, and the said trial was continued from day to day up to and including the 1st day of December, 1914, when after hearing the evidence, argument of counsel and charge of the court, the jury returned into open court the following verdict:

"We, the jury, find for the plaintiffs and interveners and against the defendants for the land in controversy, and for damages in the sum of \$1286.00.

J. W. GOLDSBERRY, Foreman."

Beaumont, Texas, Dec. 1st, 1914.

And it having been made to appear to the court that the plaintiffs and the interveners had compromised their differences, and had agreed that any recovery had by the one or the other or by both, should inure in equal portions to the heirs of William M. Goodrich, deceased, plaintiffs, on the one part, and the heirs or devisees of James Morgan, deceased, on the other part;

It is therefore ordered, adjudged and decreed by the court that plaintiffs, Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme

sole, Edward L. Montgomery, and his wife, Mary W. Montgomery, Helen M. Krasica and her husband Jean Krasica, the heirs of William M. Goodrich, deceased, and the interveners, Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband, Louis L. Cox, for those claiming under James Morgan, deceased, do have and recover of and from the Houston Oil Company of Texas, a corporation, the Kirby Lumber Company, a corporation, the Maryland Trust Company, a corporation, and the Texas Builders Supply Company, a corporation, the following described tract of land, to-wit: A part of the league granted by the Mexican Government to Charles A. Felder, situated in Hardin County, Texas, and particularly described as follows:

Beginning at the Northeast corner of said league on the West bank of the Neches River; thence West with the North boundary line of said league to the Northwest corner of the same; Thence South with the west boundary line of said league to a point on said West boundary line from which a line projected East to the Neches River running parallel with the North boundary line of said league, will include between said North boundary line and the line so projected, 2578 acres; Thence North from the point so established on the Neches River with its meanders to the place of beginning, being all of said Charles A. Felder league of land save and except the remainder thereof, to-wit: The 1850 acres South of and adjoining said above described tract.

and that defendants take nothing as against plaintiffs and interveners on their cross-action for title and possession of said premises.

And in accordance with the agreement between plaintiffs and the interveners, the title to an undivided one-half of said land is vested in the plaintiffs, the heirs of William M. Goodrich, deceased, and the title to the other undivided half of said land is vested in the heirs or devisees of James Morgan, deceased.

It is further ordered and adjudged that the plaintiffs and interveners have their writ of possession as many and as often as may be necessary to put them in possession of the above described premises.

It is further ordered, adjudged and decreed that the plaintiffs and the interveners, as above named, do have and recover of and from the Houston Oil Company of Texas and the Texas Builders Supply Company, defendants herein, the sum of \$1286.00 as damages, with interest thereon at the rate of six per cent per annum from the date of this judgment. The said sum of \$1286.00 in accordance with agreement of plaintiffs and interveners, to be divided between them as above provided with reference to the said land; that is, plaintiffs one-half and interveners one-half.

It appearing to the court by the record in this case, that the said damages of \$1286.00 and all interest on same, as aforesaid recovered, is now paid and discharged by the Houston Oil Company of Texas paying off the execution, issued on the former judgment in this cause, it is ordered that no execution issue for said damages.

It is further ordered and adjudged that the plaintiffs and the interveners do have and recover of and from the defendants Houston Oil Company of Texas, Kirby Lumber Company, Maryland Trust Company and the Texas Builders Supply Company, their costs in this behalf expended and that execution issue therefor.

And at the same time the court entered an order disposing of the Motion for Restitution formerly presented by defendants before, as follows:

On this 2nd day of December, 1914, came on further to be heard the defendants' motion for restitution heretofore filed herein, the defendants having dismissed the claim for damages for timber cut, and it appearing to the court that this case having been again tried, and on the verdict of the jury and judgment of the court this day rendered, the same recovery has been had as by the former judgment rendered herein by this court on 7th day of December, 1912, it is therefore ordered, adjudged and decreed by the court that the said motion of defendants for restitution be in all respects denied; and it further appearing to the court by the record in this case that the said damages of \$1286.00 and all interest on same, as aforesaid, recovered by the former judgment rendered herein is now paid and discharged under protest by the Houston Oil Co. of Texas paying off the execution on the former judgment in this case, it is ordered that no execution issue for the aforesaid damages nor recovered by the judgment this day rendered. To which ruling of the court in denying the said motion for restitution the defendants and each of them in open court, except, and give notice of appeal and notice of filing of writ of error to the honorable Circuit Court of Appeals for the Fifth Circuit.

GORDON RUSSELL, Judge.

Thereupon, the defendants filed in due time their Motion for New Trial, as follows:

Filed Dec. 2, 1914 J. R. Blades, Clerk.

In the District Court of the United States in and for the Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich et als

vs.

C. L. No. 408

Houston Oil Company of Texas et als

DEFENDANTS' MOTION FOR NEW TRIAL.

Come now the defendants, the Houston Oil Company of Texas, the Kirby Lumber Company and the Maryland Trust Company, and move the court to set aside the judgment rendered herein, and award defendants a new trial in this cause following reasons to-wit:

1.

The court erred to the prejudice of these defendants in refusing defendants' special charge No. Three, wherein defendants asked to be submitted to the jury the question of whether or not the purported deed from Charles A. Felder to John A. Veatch, bearing date June 18, 1839, and purporting to have been acknowledged before John Bevil, Chief Justice and ex officio Notary Public of Jasper County, Texas, under which plaintiffs and interveners claim, was in fact executed by the said Charles A. Felder, and the question of whether or not said deed was a forgery, because the evidence adduced upon the trial of this cause raised an issue of fact to be determined by the jury as to whether or not the purported deed from Charles A. Felder to John A. Veatch, bearing date June 18th, 1839, and purporting to have been acknowledged by the

grantor therein before John Bevil, Chief Justice and Ex-officio Notary Public in and for Jasper County, Texas, on the same day, under which deed plaintiffs and interveners herein claim and deraign their entire title and claim to the land in controversy, was in fact executed by the said John A. Veatch on the date which it bore, or at any other time, and from all the evidence in the case bearing on that issue it would have been competent for the jury to find that said instrument was not in fact executed by said John A. Veatch, but was in truth and fact a forgery, and said issue being raised by the evidence, and the evidence being sufficient to sustain a finding by the jury that said purported deed was not in fact a genuine instrument, but spurious, and a forgery, and was never in fact executed by the purported grantor therein, and the refusal of the court to give said charge and to so charge the jury, was error prejudicial to the defendants.

2.

The court erred to the prejudice of these defendants in its general charge to the jury in instructing the jury that there was no sufficient evidence to justify the court in submitting to the jury the question of whether or not Charles A. Felder made to John A. Veatch a deed bearing date June 18, 1839, or any date, and acknowledged same before John Bevil, Chief Justice, as aforesaid, because the evidence adduced upon the trial of this cause raised an issue of fact to be determined by the jury as to whether or not the purported deed from Charles A. Felder to John A. Veatch, bearing date June 18th, 1839, and purporting to have been acknowledged by the grantor therein before John Bevil, Chief Justice and Ex-officio Notary Public in and for Jasper County, Texas, on the same day,

under which deed plaintiffs and interveners herein claim and deraign their entire title and claim to the land in controversy, was in fact executed by the said John A. Veatch on the date which it bore, or at any other time, and from all the evidence in the case bearing on that issue, it would have been competent for the jury to find that said instrument was not in fact executed by said John A. Veatch, but was in truth and fact a forgery, and said issue being raised by the evidence, and the evidence being sufficient to sustain a finding by the jury that said purported deed was not in fact a genuine instrument, but spurious, and a forgery, and was never in fact executed by the purported grantor therein, and such charge was therefore prejudicial error to these defendants.

3.

The court erred to the prejudice of defendants in refusing to give to the jury their special charge No. Two, wherein defendants requested the court to charge the jury that active claim, payment of and rendition for taxes, and other acts of ownership upon the part of defendants, and those under whom defendants claim, and the non-claim upon the part of plaintiffs and interveners, should be considered by them in determining whether the purported deed from Charles A. Felder to John A. Veatch was a forgery, because the evidence showed claim, payment of taxes, rendition for taxes, occupancy and other acts of ownership for more than sixty years by defendants and those under whom they claim, and shows no claim during said period by the plaintiffs and interveners, and defendants were entitled to have the jury consider said facts on the issue of forgery of the Veatch deed, and the failure to give said charge was prejudicial to defendants.

4.

The court erred to the prejudice of defendants in refusing to give defendants' requested charge No. Nine, wherein defendants requested that there be submitted to the jury the question and issue of whether on or about the 10th day of June, 1839, Charles A. Felder made, executed and delivered to William A. Daniels a deed conveying the land in controversy under which deed defendants claimed by complete and regular chain of title unto them, because the evidence clearly raised the issue as to the making, execution and delivery of said deed, and defendants were entitled to have such issue determined by the jury. And the court further erred to the prejudice of defendants in assuming in its charge to the jury that the execution and delivery of said deed had not been shown and in failing to submit the question of the making, execution and delivery of said deed, to the jury.

5.

The court erred to the prejudice of defendants in assuming in its charge to the jury that a certain deed, under which defendants claimed by regular chain of title, to-wit, the deed from William A. Daniel or Daniels to T. J. Word, dated February 5, 1855, was not in fact made, executed and delivered, because the evidence showed that said deed was so made, executed, and delivered, and the court should have charged the jury that the evidence so showed.

6.

The court erred to the prejudice of defendants in assuming in its charge to the jury that a certain deed, under which defendants claimed by regular chain of title, to-wit, the deed from William A. Daniel or Daniels to T. J. Word, dated Feb-

ruary 5, 1885, was not in fact made, executed and delivered, because the evidence raised an issue of fact for the jury to determine, and which defendants were entitled to have submitted to the jury of whether or not said deed had been in fact executed.

7.

The court erred to the prejudice of defendants in refusing to give to the jury, as asked and requested by defendants, defendants' special charge No. 8, wherein the defendants requested the court to instruct the jury that in reaching a conclusion as to whether Charles A. Felder did or did not, on or about June 10, 1839, make, execute and deliver to William A. Daniels, a deed conveying the land in controversy, the jury might consider the long claim of defendants, and those under whom they claim, and payment of taxes, rendition for taxes, and other acts of ownership by defendants, and those under whom they claim, and the long non-claim upon the part of plaintiffs and interveners herein, because the evidence clearly showed that there had been long claim by defendants and those under whom they claim, together with assertion of title, acts of ownership, payment of taxes and rendition for taxes, and had been no claim for many years upon the part of plaintiffs and interveners, and defendants were entitled to have the jury consider upon the issue of whether or not the deed from Charles A. Felder to William A. Daniels was in fact executed, such facts, and to have submitted to the jury the question of the making, execution and delivery of said deed.

8.

The court erred to the prejudice of defendants in not charging the jury that the long claim shown by defendants,

and those under whom they claim, of the land in controversy, together with payment of taxes, rendition for taxes, and other acts of ownership shown by the evidence herein, and the non-claim upon the part of plaintiffs and interveners, was sufficient on which to base a presumption and finding that Charles A. Felder actually executed a deed to the said William A. Daniels, as claimed by defendants, because the evidence was such as to justify the court in charging the jury that defendants had established the said deed from Charles A. Felder to said William A. Daniels.

9.

The court erred to the prejudice of defendants in refusing to give defendants' requested instruction No. Four, and to instruct the jury, as asked therein, that if the jury found that a deed had been made, executed and delivered by the said Charles A. Felder to said William A. Daniels on the 10th day of June, 1839, conveying the property in controversy, said Daniels would have been entitled to a reasonable time within which to present same to the Clerk of the County Court of Liberty County for record, because the uncontroverted facts showed that the deed from the said Charles A. Felder to said William A. Daniels was executed on the 10th day of June, 1839, eight days previous to the date of the alleged deed from the said Charles A. Felder to said John A. Veatch, and under the law the said Daniels would have had a reasonable time to have presented his deed to the Clerk of the County Court of Liberty County, in which county the property in controversy was then situated, and if said deed was so presented in a reasonable time, plaintiffs and interveners could not recover, and the defendants were entitled to have the jury

find upon the issue whether or not said deed was so presented to the County Clerk of Liberty County within a reasonable time, and they were entitled to a finding from the jury as to what was a reasonable time.

10.

The court erred to the prejudice of defendants in refusing to give to the jury the defendants' requested instruction or charge Number Five, to the effect that if the jury find that Charles A. Felder made, executed and delivered to William A. Daniels a deed dated June 10, 1839, conveying the Charles A. Felder league in Hardin County, Texas, and that said deed had been presented to the Clerk of the County Court of Liberty County for record at or prior to the time the deed from Felder to the said John A. Veatch was executed, if it was executed, the plaintiffs and interveners could not recover, because there was evidence showing the destruction of the deed records of Liberty County, and that said deed was presented by the said Daniels for record, and under the law, plaintiffs and interveners cannot recover if said Daniels did so present said deed to the County Clerk of Liberty County for record, prior to the date of the deed from Felder to Veatch. And further that the court erred to the prejudice of defendants in not including in its charge to the jury the matters set forth in said requested instruction No. Five.

11.

The court erred to the prejudice of defendants in refusing to give to the jury defendants' requested charge or instructions Nos. Six and Seven, to the effect that if the jury found that the deed from Charles A. Felder to the said William A. Daniels was in fact executed, and the jury further found that

plaintiffs and interveners have not shown in this cause that said deed was not presented to the Clerk of the County Court of Liberty County for record, prior to June 18, 1839, the date of the alleged deed from Charles A. Felder to John A. Veatch, that plaintiffs and interveners cannot recover, because the presumptions are that said deed was forthwith presented by the said Daniels to the County Clerk of Liberty County for record, and the burden of proof is upon plaintiffs and interveners to prove that it was not so presented, and the court further erred in failing to include said matters in its charge to the jury, and in failing to so charge the jury.

12.

The court erred to the prejudice of defendants in failing and refusing to give defendants' special requested charge or instruction No. 1, instructing the jury to return a verdict for the defendants, because the weight of the evidence shows, and requires a finding that on the 10th day of June, 1839, Charles A. Felder made, executed and delivered to William A. Daniels, a deed conveying the tract of land in controversy, and even though it be found that Charles A. Felder, on the 18th day of June, 1839, made, executed and delivered to John A. Veatch a deed to the same tract of land, that the evidence in this case requires a finding that the said John A. Veatch, at the date of the execution to him of said deed by the said Felder, if in fact it was executed, had notice of the older and prior deed from the said Felder to the said Daniels, and further that the said John A. Veatch was not a bona fide innocent purchaser for value of said tract of land, without notice of the older and prior deed to the said Daniels, the evidence being that the Houston Oil Company of Texas, and those under whom it claims, or claiming under the William

A. Daniels deed, had rendered said property for taxes, and paid taxes thereon, cut timber therefrom, taken sand therefrom, kept trespassers therefrom, and exercised all and many acts of ownership thereon for a period of more than sixty years, and that plaintiffs and interveners have, during said time, asserted no claim thereto, paid no taxes thereon, and exercised no acts of ownership thereon, all of which facts and other facts in evidence, are sufficient on which to base the finding that the said Veatch did not pay value, and that he was not a bona fide innocent purchaser of said land, without notice of the older and prior title of the said Daniels.

13.

The court erred to the prejudice of defendants in refusing to give to the jury, and refusing to instruct the jury in accordance with defendants' special requested charge or instruction No. ten, wherein the defendants requested the court to charge the jury that if the jury should find that the said Charles A. Felder, on the 10th day of June, 1839, made, executed and delivered to William A. Daniels, a deed for the land in controversy, and that the jury should further find that on the 18th day of June, 1839, said Felder conveyed the same to the said John A. Veatch, the plaintiffs and interveners could not recover herein, unless it was shown that the said John A. Veatch was a bona fide innocent purchaser of said property for value, and without notice of the older and prior deed to said William A. Daniels, because the evidence herein is sufficient to require the court to submit to the jury the question of whether or not the said Veatch was or was not such bona fide innocent purchaser for value, without notice of the Daniels deed, and defendants were entitled to have said question submitted to the jury, and were entitled

to have the jury pass thereon, and the court erred in assuming in its charge to the jury that the said Veatch was such bona fide innocent purchaser for value, without notice of said deed to said Daniels, and the court erred in charging the jury in effect that such was the case.

14.

The court erred to the prejudice of defendants in failing to charge the jury that the long claim and assertion of title to the land in controversy by the defendants, and those under whom defendants claim, together with their acts of possession, payment of taxes, etc., as opposed to the long non-claim of plaintiffs and interveners, and those under whom they claim, and the long non-assertion of title to the land in controversy by them, was sufficient to and did raise a presumption of fact that the said John A. Veatch knew or had notice of the prior deed from Charles A. Felder to William A. Daniels, and that he did not pay value for the land claimed to have been conveyed by Charles A. Felder to him, all of which is set forth in defendants' requested charge or instruction No. ten and No. eleven, and the court erred to the prejudice of defendants in refusing to give each and both of said charges.

15.

The court erred to the prejudice of defendants in failing to give defendants' special requested charge or instruction No. one to the jury, charging the jury to return a verdict for the defendants herein, and against the plaintiffs and interveners, because if the purported deed from the said Felder to the said John A. Veatch, bearing date June 18, 1839, was established by the evidence sufficiently to justify the court in

charging the jury to that effect, or should the jury have found that such was the fact, the evidence likewise is sufficient to support and require a finding by the court that the said Charles A. Felder, prior to the date of the deed to the said John A. Veatch, had conveyed the Charles A. Felder league, part of which is involved in this suit, to William A. Daniels, under whom the defendants herein claim by regular chain of title, and there is no proof offered by the plaintiffs and interveners that the said John A. Veatch was a bona fide innocent purchaser of said tract of land for value, without notice of the older title and claim under the deed to the said William A. Daniels, but on the contrary, the evidence clearly shows that said John A. Veatch was not such bona fide innocent purchaser for value, and without notice of the older deed to Daniels.

16.

The court erred to the prejudice of defendants in refusing to give defendants' special charge and instruction No. one directing the jury to return a verdict for the defendants, because even though there be sufficient evidence to support the finding of the court or the jury that a deed was made, executed and delivered by the said Charles A. Felder to the said John A. Veatch, on June 18, 1839, there is likewise sufficient evidence to support and require a finding that said Charles A. Felder conveyed the same property to William A. Daniels on June 10, 1839, by deed of that date, under which deed defendants claim by regular chain of title, and further, because it appears that the said John A. Veatch could not have been protected, and he and his vendees and those who claim under said deed, cannot be protected as bona fide innocent purchasers for value, because the deed from the said

Felder to the said Veatch is not and does not purport to be a deed conveying the title, but is only a quitclaim deed.

17.

The court erred to the prejudice of defendants in refusing to give defendants' peremptory instruction to the jury to return a verdict, as requested in defendants' requested special charge No. one, because the evidence clearly shows that Charles A. Felder on the 10th day of June, 1839, Charles A. Felder made, executed and delivered to William A. Daniels, under whom defendants claim by regular chain of title, a deed conveying the land in controversy, and that the said Charles A. Felder on, to-wit, the 21st day of May, 1840, made, executed and delivered to Joshua Smith, a deed conveying to the said Joshua Smith, the Charles A. Felder league of land, a part of which is in controversy herein, and because the undisputed facts show that both the deed from the said Charles A. Felder to the said William A. Daniels and from Charles A. Felder to Joshua Smith were presented for record and filed for record and recorded in the Deed Records of Menard County, in which said property was then situated, long prior to the time when the alleged deed from Charles A. Felder to John A. Veatch was presented for record to the clerk of the County Court of Menard County, and filed for record in Menard County, or recorded in Menard County, and further because it clearly appears that under the law the record of the deed from Felder to Veatch, if any, in Liberty County was not sufficient to impart notice to the said Joshua Smith, and those who claim under him, or to impart validity to the said deed from Charles A. Felder to the said John A. Veatch.

18.

The court erred to the prejudice of defendants in refusing to give defendants' peremptory instruction No. one instructing the jury to return a verdict for the defendants, by reason that the evidence was sufficient to show and support and require a finding that Charles A. Felder on the 10th day of June, 1839, conveyed the tract of land in controversy to William A. Daniels, under whom defendants claim by regular chain of title, and even if it be found either by the court or by the jury that the deed from Charles A. Felder to John A. Veatch was in fact made, executed and delivered the presumptions are that the deed from said Felder to the said Daniels was presented to the clerk of the County Court of Liberty County, prior to the date of the deed from Felder to Veatch, if in fact it was so executed, and that the said John A. Veatch was charged with constructive notice thereof, by reason of same being so presented to said clerk and recorded, and the presumptions are that the said John A. Veatch had notice of the prior deed to the said William A. Daniels, and that the said John A. Veatch was not a bona fide innocent purchaser, and the presumptions are that the said John A. Veatch did not pay value for said lands, all of which presumptions arise by reason of the long claim and acts of ownership upon the part of the defendants and those under whom they claim, and the non-claim upon the part of the plaintiffs and interveners, and those under whom they claim.

19.

The court erred to the prejudice of defendants in failing and refusing to give special charge No. twelve requested by defendants, to the jury, to the effect that defendants claim

that on May 21, 1840, Charles A. Felder made, executed and delivered to Joshua Smith a deed conveying the land in controversy, and that it was for the jury to determine whether or not said deed was so made, executed and delivered, and the court erred in refusing to submit to the jury the question of the making, execution and delivery of said deed from the said Felder to the said Smith, and erred in instructing the jury in effect that said deed was not so made, executed and delivered, because the evidence was sufficient to require the submission of said issue to the jury, and the defendants were entitled to go to the jury and have the jury pass upon such issue.

20.

The court erred in refusing to give defendants' requested charge No. fourteen to the jury, to the effect that in passing upon the question of whether or not Charles A. Felder, on May 21, 1840, did make, execute and deliver to Joshua Smith a deed conveying the land in controversy, the jury might consider the long claim and acts of ownership, payment of taxes, rendition for taxes, and other acts of ownership by defendants, and those under whom they claim, and the non-claim by plaintiffs and interveners in reaching a conclusion as to whether or not said deed was in fact so made, executed and delivered, because the evidence clearly raised said issue, and the defendants were entitled to have the jury pass upon such issue, and have the jury consider the questions of claim on the part of defendants and those under whom they claim, and the non-claim on the part of plaintiffs and interveners, in reaching their conclusion on such issue, and the court erred in assuming in effect in its charge to the

jury that the said deed from the said Felder to the said Smith had not in fact been executed.

21.

The court erred to the prejudice of the defendants in refusing defendants' special requested charge number thirteen, to the effect that if the jury found that on May 21, 1840, Charles A. Felder made, executed and delivered to Joshua Smith a deed of that date, conveying to him, the said Smith, the Charles A. Felder league of land, a part of which is in controversy in this suit, that defendants claimed the property in controversy under a chain of title under said Joshua Smith, and that said title passed by regular chain of conveyances to John P. Irvin, and wherein there was submitted in said charge, the request for instruction to the jury, that if they should find that said John P. Irvin was a bona fide innocent purchaser for value of said property, without notice of said deed from the said Felder to the said Veatch, that said plaintiffs and interveners could not recover, because the evidence clearly showed that defendants were entitled to have the jury pass upon the question of the making, execution and delivery of the deed from Felder to Smith, and upon the question of whether or not the said John P. Irvin was or was not a bona fide innocent purchaser of said property, and because the evidence permitted and required a finding that the said John P. Irvin was such bona fide innocent purchaser for value of said property, without notice of deed from Felder to Veatch, and the court further erred in assuming, in its charge to the jury, in effect, that said deed from said Charles A. Felder to said Joshua Smith was in fact executed and in assuming that the said John P. Irvin was a bona fide

innocent purchaser for value without notice of the said deed from Felder to Veatch.

22.

The court erred in refusing to give defendants' special requested instruction or charge No. One instructing the jury to return a verdict for the defendants, because the evidence justified and required a finding that Charles A. Felder on the 21st day of May, 1840, made, executed and delivered to Joshua Smith a deed for the league of land in controversy herein, and that defendants held by regular chain of conveyances under the said Joshua Smith, and the evidence further justified and required a finding that John P. Irvin, one of the persons under whom defendants claim, and one of the persons who claim under the said deed to Joshua Smith, was at the time of his purchase of said land, a bona fide innocent purchaser for value, without notice of the deed from Charles A. Felder to John A. Veatch, if any, or the claim of title thereunder, either actual or constructive, and the court erred in assuming, in its charge to the jury, that the said deed from Felder to Smith had not in fact been executed, and that the said Irvin was such bona fide innocent purchaser for value, and without notice.

23.

The court erred to the prejudice of the defendants in admitting in evidence the purported deed from Charles A. Felder to John A. Veatch of the date June 18, 1839, because an affidavit of forgery was filed to said deed, which affidavit of forgery denied the execution of said deed, the acknowledgement thereof, and the filing of same for record, as on the date and at the time purported to have been endorsed on

same by the clerk of Liberty County, and there was not sufficient evidence to warrant the court in assuming that said deed had been executed, that it had been acknowledged, or that it had been filed for record in Liberty County on the 4th day of November, 1839, there being no evidence or corroborating circumstances to show that the endorsement on said purported deed was made by the recorder of Liberty County, Texas, or that said endorsement and signature by George W. Miles, the purported recorder of Liberty County, Texas, was in the handwriting of said George W. Miles, if he was such recorder, and it is not shown that said George W. Miles was the recorder of Liberty County, Texas.

24.

The court erred to the prejudice of defendants in overruling defendants' motion and sustaining plaintiffs' and interveners' objections and exceptions thereto, in which motion defendants moved the court to require plaintiffs and interveners to make restitution of the sums of money collected by plaintiffs and interveners under and by virtue of the former judgment in this cause, which was reversed, and in which defendants moved the court to require plaintiffs and interveners to make restitution of the property involved in this suit, seized under writ of possession under the former judgment rendered in this cause, and reversed, all of which is fully shown by defendants' motion, and plaintiffs' and interveners' exceptions thereto, in the record in this cause.

25.

The court erred in requiring defendants to go to trial in this cause upon the merits, until plaintiffs and interveners had restored to defendants the property involved in this suit,

and the money taken and collected by plaintiffs and interveners by virtue of and under the former judgment in this cause, which was reversed.

26.

The court erred to the prejudice of defendants in refusing defendants' special instruction or charge No. One to the jury to render a verdict for the defendants herein, because under the evidence herein on the law applicable thereto, it would be presumed that there were deeds of conveyance superior in all respects to the title asserted by plaintiffs and interveners out of the said Charles A. Felder to

(a) R. O. Lusk, under whom defendants claim by regular chain of title.

(b) William A. Daniels, under whom defendants claim by regular chain of conveyance.

(c) Joshua Smith, under whom defendants claim by regular chain of title.

Because the evidence in this case clearly shows that for more than sixty years defendants and those under whom they claim, had claimed the tract of land in controversy, paying taxes thereon, rendering same for taxes, cutting timber therefrom, taking sand therefrom, together with many other acts of ownership, and the evidence further clearly shows that neither plaintiffs nor interveners nor those under whom they claim, have during said time asserted any title to said property, or any part thereof, or paid any taxes thereon, or exercised any acts of ownership thereon, and under said state of facts and under the law it will be presumed that superior title passed to some or all of the persons under whom defendants claim.

27.

The court erred to the prejudice of defendants in failing and refusing to give defendants' peremptory instruction No. One, charging the jury to return a verdict for the defendants, for the reason that it clearly appears that if Charles A. Felder did in fact make, execute and deliver the deed to said John A. Veatch, as claimed by plaintiffs and interveners, and under which said persons claim, that there was only conveyed by said deed to the said Veatch an equitable title to said land, and the burden of proof is upon the said Veatch and those claiming under him to show that he did not have notice of the prior deed from Charles A. Felder to William A. Daniels, and that he was the bona fide innocent purchaser for value, without notice of said deed to the said Daniels.

28.

The court erred to the prejudice of defendants in assuming that the purported deed from Charles A. Felder to John A. Veatch, dated June 18, 1839, was in fact made, executed and delivered by said Felder to said Veatch, because the uncontradicted evidence in this case shows that the said purported deed from Felder to Veatch on its face was not free from suspicion, in that the original letter written by said John A. Veatch, and the original deeds executed by said John A. Veatch, as well as the purported deed from Felder to Veatch, were all written in the same handwriting, and by the said John A. Veatch, and in that the uncontradicted evidence in this case shows that the said John A. Veatch wrote the said deed from Felder to Veatch, that he signed the name of Charles A. Felder thereto, and that he, himself, wrote the names of the subscribing witnesses, W. B. Barnett and Samuel Palmer to said deed.

29.

The court erred to the prejudice of defendants in assuming that the execution of the said deed from Charles A. Felder to John A. Veatch had been duly proved, because the uncontroverted evidence in this case shows by comparison of handwriting and otherwise, that the said John A. Veatch himself wrote said deed, signed the name of Charles A. Felder thereto, as well as that of the subscribing witnesses, and the evidence in this case further showing that neither of said subscribing witnesses, Barnett or Palmer had ever been heard of as having been in the vicinity of Jasper County before, at or since the date of the purported execution of said deed.

30.

The court erred to the prejudice of defendants in refusing to give special instruction No. One, directing the jury to return a verdict against the interveners herein, because it is clearly established by the evidence in this cause that James Morgan, the ancestor of interveners and under whose will interveners claim, heretofore, to-wit, on the 21st day of November, 1844, conveyed to William W. Swain the tract of land in controversy herein, and the interveners have, therefore, shown no title whatsoever to the property in controversy, and this is true, notwithstanding the agreement entered into between plaintiffs and interveners, because under said agreement the interveners, if not entitled to recover in their own right, could only recover under the plaintiffs, and as vendees of the plaintiffs, and only such portion of the land in controversy as plaintiffs may have shown themselves entitled to recover, and the court further erred in rendering judgment for the interveners herein for the same reasons.

31.

The court erred to the prejudice of defendants in refusing to admit in evidence and in refusing to consider in evidence the certified copy of field notes and the certified copy of patent of title of the A. Lancaster survey in Hardin County, shown to be in conflict with the Charles A. Felder league, and to be older and prior in location to the Felder league, and to be a superior outstanding title to 290 acres of the Felder league with which neither plaintiffs nor interveners connect, and the court further erred in rendering judgment for plaintiffs and interveners for the portion of the Charles A. Felder league shown by the evidence to be in conflict with the said A. Lancaster survey.

32.

The court erred to the prejudice of defendants in refusing to give defendants' special charge or instruction No. One directing the jury to return a verdict for defendants, and the court further erred in rendering judgment in favor of the interveners for the 2578 acres of land out of the Charles A. Felder league, because the evidence clearly showed that there can be no title and is no title to the land in controversy in interveners, for the reason that interveners claim under and by virtue of the last will and testament of James Morgan, deceased, and as devisees of said Morgan, and the evidence in this case clearly shows that the Charles A. Felder league consists of 4428 acres of land, and that if the said James Morgan acquired title to said league, he only acquired title to said 4428 acres, and that the said James Morgan on to-wit the 21st day of November, 1844, conveyed to W. W. Swain 2578 acres of said league of land, being the property now in con-

troversy herein, and that the said James Morgan, on the 17th day of October, 1845, conveyed to William D. Lee 1850 acres out of said Charles A. Felder survey, which passed by mesne conveyances to William Walker, and the said James Morgan on the 12th day of March, 1863, conveyed to Ellen Lee 925 acres out of said Charles A. Felder survey, and that the said James Morgan on the 7th day of October, 1865, conveyed to Ellen Lee 925 acres out of said Charles A. Felder survey, and it further appears from the evidence offered in this cause, which evidence was erroneously excluded by the court, that the Charles A. Felder survey is in conflict with the A. Lancaster survey to the extent of 290 acres, and that the said A. Lancaster survey constitutes a superior outstanding title, with which the interveners have not connected themselves, and under which they do not claim, from all of which it clearly appears that the interveners have no title whatsoever to the tract of land in controversy, or at the most that the interveners are only entitled to judgment in the event the deed from James Morgan to W. E. Swain is not established, to the difference between the aggregate amount of the tracts conveyed by Morgan to W. D. Lee and by Morgan to Ellen Lee, which amount to 3700 acres, to which should be added the 290 acres, which are in conflict, making an aggregate amount of 3990 acres, making the highest amount that interveners would be entitled to judgment for, 438 acres, and this is true, notwithstanding the agreement entered into between the plaintiffs and interveners, because under said agreement, if the interveners are not entitled to recover in their own right, they can only recover under and through plaintiffs, and the vendees of plaintiffs.

33.

The court erred to the prejudice of defendants in permitting the interveners to offer in evidence over the objections of defendants, the certified copy of the plaintiff's petition in the cause of Walker et al vs. Beaumont Shingle & Lumber Company, because the same was wholly irrelevant and immaterial to any issue in the cause, and these defendants were not in any way bound thereby, or estopped thereby, and could not be legally bound or estopped by reason of the filing of said petition, nor what was contained therein, and because said petition would not have the legal effect of declaring the portion of the Charles A. Felder league to which the deed from James Morgan to W. D. Lee could be applied, all of which objections are set forth and will be set forth in bills of exceptions saved by defendants in this cause.

34.

The court erred to the prejudice of defendants in refusing to give to the jury special instruction No. Eighteen, requested by defendants, wherein defendants request the court to instruct the jury that if the jury found that on the 21st day of November, 1844, James Morgan made, executed and delivered to William W. Swain a deed to the property in controversy herein, that the jury should return a verdict against interveners and in favor of the defendants herein, and the court erred in rendering a judgment in favor of interveners for 2578 acres of the land in controversy herein, because the evidence clearly raised an issue of fact upon which the defendants herein were entitled to have the jury pass, and which the court should have submitted to the jury, as to whether or not the said deed from the said Morgan to the said Swain

was in fact made, executed and delivered, and the court erred in assuming in effect, in its charge to the jury, that said deed had been so made, executed and delivered, and this is true, notwithstanding the agreement entered into between the plaintiffs and interveners, because under said agreement between the plaintiffs and interveners, the interveners, if not entitled to recover in their own right, could only recover under the through and as vendees of the plaintiffs, and the evidence in this case clearly shows that the plaintiffs themselves in their own right are not entitled to recover, or if entitled to recover, are not entitled to recover more than 1721 acres of land.

35.

The court erred to the prejudice of defendants in rendering judgment in favor of the interveners for 2578 acres of land, and erred in rendering judgment for interveners for any of the land sued for, because said judgment is contrary to the law, and the evidence, in that it clearly appears

(a) That Charles A. Felder never acquired title to the 290 acres of the Felder league in controversy, which is in conflict with the A. Lancaster survey, as clearly appears from the legal evidence offered by defendants, and that said 290 acres did not at any time pass to the said John A. Veatch, or to the said James Morgan;

(b) That the said James Morgan on the 21st day of November, 1844, made, executed and delivered to W. W. Swain his deed for 2578 acres of land, being the land in controversy herein now;

(c) That the said James Morgan on the 17th day of October, 1845, made, executed and delivered to William D. Lee a deed for 1850 acres out of said Felder league.

(d) That the said James Morgan on the 12th day of March, 1863, made, executed and delivered to Ellen Lee a deed for 925 acres out of said Felder league.

(e) That the said James Morgan on the 7th of October, 1865, made, executed and delivered to the said Ellen Lee a deed for 925 acres out of said Felder league.

(f) That the interveners claim herein as devisees under the will of said Morgan, and it clearly appears from the facts above set forth that they have no title to any part of the land now in controversy, and this notwithstanding the agreement entered into between plaintiffs and interveners, because interveners, if not entitled to recover in their own right, can only recover under and as vendees of plaintiffs.

36.

That the court erred to the prejudice of defendants in refusing to give defendants' requested instruction No. One, instructing the jury to return their verdict for defendants, and to instruct the jury that the plaintiffs take nothing, because the plaintiffs failed to make out their case herein, in that plaintiffs did not show that William M. Goodrich under whom plaintiffs claim ever acquired any title to the tract of land in controversy herein, in that

(a) Plaintiffs claim under an alleged deed from James Morgan to W. W. Swain, dated the 21st day of November, 1844, and purporting to convey the land in controversy in this suit, and the evidence in this case as between plaintiffs and defendants is wholly insufficient to establish the making and execution of said deed from the said Morgan to the said Swain;

(b) Plaintiffs claim under an alleged deed from William W. Swain to Robert Rose, dated the 5th day of January, 1846, and plaintiffs have failed to show by the evidence herein that said deed was in fact made, executed and delivered and the court erred in rendering judgment for the plaintiffs herein for any portion of the land involved in this suit, and particularly the court erred in rendering judgment for plaintiffs herein for more than 1721 acres, being the amount alleged to have been conveyed by the said Swain to the said Robert Rose, plaintiffs having only established title to said 1721 acres, if they have established title to any of the land in controversy in this suit.

37.

The court erred to the prejudice of the defendants in admitting in evidence a certified copy of an alleged deed from William W. Swain to Robert Rose, dated January 5, 1846, for the reason that it clearly appears that neither said deed nor a certified copy thereof has ever been recorded in Hardin County, Texas, where the property in question is situated, and certified copy offered in evidence by the plaintiffs is from the records of Tyler County and purports to show that said deed was filed for record in Tyler County on the 5th day of October, 1858, after the creation of Hardin County, and at a time when the property was situated in Hardin County, and not in Tyler County, and because under the law certified copy from Tyler County of said deed is a nullity, of no force and effect, proves nothing and is wholly inadmissible in evidence as a muniment of title, and defendants refer to their objections and exceptions made upon the trial of this cause as to said instruments. And the court further erred in render-

ing judgment for plaintiffs for the land in controversy, based upon said instrument or said certified copy, and erred in assuming in its charge to the jury that it was proven that the said William W. Swain made a deed to the said Robert Rose as claimed by the plaintiffs.

38.

The court erred in rendering judgment for plaintiffs herein, because it was not shown that plaintiffs connected themselves with the sovereignty of the soil by a chain of title legally admissible in evidence and particularly because plaintiffs have not shown that William W. Swain conveyed the 1721 acres of land which plaintiffs claim to have been devised to them by their ancestor, William M. Goodrich, to Robert Rose, under whom said Goodrich claimed.

39.

That the court erred to the prejudice of these defendants in rendering judgment in favor of plaintiffs and interveners for 2578 acres of land, because under all of the evidence and the law applicable thereto, plaintiffs and interveners, if entitled to recover anything, were only entitled to recover 1721 acres of land, in that all of the title to the 2578 acres of land passed out of James Morgan, under whom interveners claim, as devisees, prior to the death of said Morgan, and it clearly appears from the evidence herein that if any title passed to W. M. Goodrich under whom plaintiffs claim as devisees, only 1721 acres passed to him, the said W. M. Goodrich.

40.

The court erred to the prejudice of defendants in withdrawing from the jury the issue of whether or not there was

a deed executed by James Morgan to W. W. Swain, dated November 21, 1844, and erred in assuming in effect, in its charge to the jury, that said deed had not been established and proven, and erred in rendering judgment for plaintiffs and interveners herein for the 2578 acres of land in controversy, or for any part thereof, because the question of whether or not the said deed from the said James Morgan to W. W. Swain had in fact been executed and delivered, was a question of fact for the jury, and the defendants were entitled to have said question submitted to the jury, and were entitled to have the jury pass upon said question.

41.

The court erred in rendering judgment in favor of the plaintiffs herein, because under the evidence in this case, and the law applicable thereto, it clearly appears that James Morgan only acquired title, if any, to 4188 acres of land out of the Charles A. Felder league, to-wit, that portion of the Felder league not in conflict with the A. Lancaster survey, and that the said James Morgan, prior to his death, conveyed to other persons, with whom plaintiffs do not in any way whatsoever connect, and from whom plaintiffs do not and have not acquired title, and whose title plaintiffs have in no way acquired, 6278 acres of land to be taken out of said Charles A. Felder league, or more land than said James Morgan owned on said survey.

42.

The court erred to the prejudice of defendants in failing and refusing to give defendants' peremptory instruction No. One, instructing the jury to return a verdict for defendants, because the evidence in this case showed that the Texas Pine

Land Association, under whom the Houston Oil Company of Texas claims, had and held, through its agent, G. B. & K. C. Railroad, peaceable, adverse and continuous possession of the tract of land in controversy, for more than three years, and for more than five years, holding under deeds duly registered, and paying all taxes thereon, and under the uncontroverted evidence in the case, said G. B. & K. C. Railroad was holding the entire Charles A. Felder league, and was entitled to use and enjoy the entire Charles A. Felder league of land.

43.

Because the court erred to the prejudice of defendants in permitting the witnesses, T. E. Danziger, N. B. Scott, W. H. Knipple, Wiley Brackin, Joe Bumstead, Wm. Carroll and Tom Pattillo, over the objections of defendants, to testify as to the size and extent of what the witnesses termed "sand pit 'F,'" the "sand pit" or "sand hill," at the station of Fletcher on the Gulf Colorado & Santa Fe Railway on the Charles A. Felder league of land in Hardin County, because such testimony was not competent to vary or change the plain import of the contracts introduced in evidence between the Houston Oil Company of Texas and the Texas Builders' Supply Company, said contracts being entire, complete and wholly unambiguous; because said contracts were plain and unambiguous, showing the clear express intention of the parties thereto that the Texas Builders' Supply Company should and by virtue of said contracts did, have the right and license to enter in and upon the land for the purpose of taking sand from wherever on said land same might be found, and the contracts did not limit the Texas Builders' Supply Company to any defined part or portion of said land; because

the testimony of said witnesses was merely their views, and opinions as to what *sand pit F* was, and not what the contracting parties meant, and understood sand pit F to be; because said contracts did not by metes and bounds or by other description, limit or restrict the operations thereunder to any specific or defined part of the land in controversy.

44.

Because the court erred to the prejudice of defendants in assuming that Felder to Veatch deed was recorded in Liberty County, Texas, before the deed to Daniels and Smith because the affidavit of forgery denied the recording of same, placing the burden of proving same on plaintiffs and interveners, and no proof appeared or corroborating circumstances were shown to establish the record of said deed, the long non-claim by them being strongly presumptive that same was not recorded.

45.

Because the court erred to the prejudice of defendants in failing and refusing to give to the jury defendants' special requested charge No. 15, instructing the jury that a suit instituted to recover land in this state, as against any person in peaceable and adverse possession thereof, under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward; that if the jury should find that the defendants or their predecessors in title had had peaceable and adverse possession of the land in controversy, for three years, under title or color of title prior to the institution of this suit, then defendants should recover for the reasons that the evidence showed that the defendants, and their predecessors in title

had been in uncontroverted, adverse and peaceable possession of said premises for more than three years before the institution of this suit, claiming under title and color of title from and under the sovereignty of the soil, in that defendants held under a deed from Charles A. Felder, the original grantee, to William A. Daniels, dated June 10, 1839; because the deed from Charles A. Felder to William A. Daniels antedated the purported deed from Charles A. Felder to John A. Veatch, under whom plaintiffs and interveners claim title; because if Felder executed two deeds, the first (that to William A. Daniels) passed the title to the land, under which deed defendants hold, and was title and color of title as against the junior claim under the purported deed from Felder to Veatch, regardless of the registration of either; because the title to the land vested in William A. Daniels, and the presumption is that the deed to him was duly registered in Liberty County, and the evidence being that the records of said county were destroyed in 1874, the necessity of evidence of due registration prior to the date of the purported execution of the deed from Felder to Veatch was not essential to support title under and by virtue of the three years statute of limitation; because the active and long assertion of claim and use of said land by defendants, as opposed to the long non-assertion of claim and non-use of same by plaintiffs and interveners, even though the deed from Felder to Daniels was not recorded until after the execution of the deed to Veatch (if any) was sufficient to raise the presumption (and the jury could have found) that said Veatch at the date he took said deed, if any, had notice of the then existing deed from Felder to Daniels; because the record of the purported Veatch deed having been destroyed

in 1874, the record of the deed to Daniels in the Menard County records was sufficient title and color of title to support the three years statute of limitation.

46.

Because the court erred to the prejudice of the defendants in failing and refusing to give to the jury defendants' special requested charge No. 16 instructing the jury that if defendants, or those whose title they held, had held for ten years peaceable and adverse possession of the lands in controversy, cultivating, using or enjoying the same, the title to said lands was in defendants by virtue of the ten years statute of limitation, because the evidence before the court showed that the Texas Pine Land Association and the Houston Oil Company of Texas had held and had such peaceable, and adverse possession of said land for more than ten years, using and enjoying the same, claiming to own said land, such evidence raising such issue of title by and under the statute of ten years limitation that the same should have been submitted to the jury.

47.

The court erred to the prejudice of defendants in admitting in evidence over the objections of defendants, as evidence of title, to which defendants in open court excepted, as shown by bill of exceptions herein, the recitals of alleged prior deeds of conveyances in the following deeds offered by plaintiffs and interveners, to-wit:

- (a) John A. Veatch to James Morgan.
- (b) James Morgan to W. W. Swain.
- (c) W. W. Swain to Robert Rose.

(d) John N. Rose to Wm. M. Goodrich, and in considering said recitals as evidence of title, and on the issue of forgery herein.

48.

The court erred to the prejudice of defendants in permitting the witness, J. R. Bevil, to testify to the handwriting of John Bevil to the certificate of acknowledgment to the alleged deed from Felder to Veatch, over defendants' objections, as shown by bill of exceptions herein.

49.

The court erred to the prejudice of defendants in admitting in evidence over defendants' objections, the various documents produced from the custody of the witness, A. L. Mays, as a standard of comparison of the alleged handwriting of John Bevil, to the certificate of acknowledgment to the purported deed from Charles A. Felder to John A. Veatch, for the reason shown by bill of exceptions herein.

50.

The court erred to the prejudice of defendants in admitting in evidence over the objections of defendants, the testimony of Henry Ralph, T. B. Beaty, Mrs. Nellie Lowe, David Rafferty, C. H. Rafferty, Joseph D. Adams, O. B. Johnson, Mrs. Annie E. Snow, Tom C. Davis, as to the general reputation of John A. Veatch, as shown by bill of exceptions herein, because said testimony was wholly irrelevant and immaterial and for the reasons set forth in said bill of exceptions.

51.

The court erred to the prejudice of defendants, in admitting in evidence as a muniment of title, over the objec-

tions of defendants, to which defendants in open court excepted, and erred in rendering judgment for plaintiffs based on same, the certified copy of deed from John N. Rose to William M. Goodrich, dated January 12, 1871, for the following reasons³, as shown by bill of exceptions herein, to-wit:

(a) Because the certified copy offered is from the deed records of a county other than where the land is situated, and purporting to have been executed in said county and filed when none of the land in controversy was situated in said county, and no land described in said deed is situated in said county, and neither the original deed nor said certified copy is shown to have been recorded in Hardin County, where the land lies, and there is no law which would authorize the admission in evidence of such a certified copy.

(b) Because the deed purports to have been acknowledged before James Garland, Judge of the Corporation Court of Lynchburg, Virginia, January 13, 1871, and such officer was not authorized nor permitted by law to take and certify such acknowledgment under the law then and since in force, and such purported action is void and of no effect.

(c) Because it is not shown that said purported deed has been of record in Hardin County, the county where the land is situated, for ten years, in that it is shown that the record thereof was destroyed and said deed was not again recorded, as required by law.

(d) Because the record of said deed in a county other than where the land is situated for ten years was not sufficient to cure the invalidity of said acknowledgment.

(e) Because even if it be conceded, which it is not, that said deed was recorded in the county where the land lies for ten years, or that same was recorded in a county

other than where the land lies, for ten years, there is no law which validates certificates of acknowledgment or deeds with defective certificates, where such defects were due to want of authority in the officer taking same.

(f) Because it is now shown that there has been no adverse claim or inconsistent claim to the one evidenced by said instrument, but on the contrary it affirmatively appears from the pleadings and evidence herein that the interveners herein are claiming and have been for many years adversely and inconsistently to plaintiffs, who claim under said deed.

(g) Because said deed is void for want of description, and does not describe any land and particularly the land in controversy in this suit.

52.

The court erred to the prejudice of defendants in admitting in evidence over defendants' objections, certified copy of the purported deed from William W. Swain to Robert Rose, dated January 5, 1846, which defendants in open court excepted to, as shown by bill of exceptions herein, and erred in rendering judgment for plaintiffs, based on same, for the following reasons, to-wit:

(a) Because the certified copy offered is from the deed records of a county other than where the land is situated, and purporting to have been executed in said county and filed when none of the land in controversy was situated in said county, and no land described in said deed is situated in said county, and neither the original deed nor said certified copy is shown to have been recorded in Hardin County, where the land lies, and there is no law which would authorize the admission in evidence of such a certified copy.

845

(b) Because the said purported deed does not appear to have been acknowledged as required by law, and is not entitled to go to record, and the record thereof is void and of no effect.

(c) Because the record of said deed in a county other than where the land is situated for ten years was not sufficient to cure the invalidity of said acknowledgment.

(d) Because even if it be conceded, which it is not, that said deed was recorded in the county where the land lies for ten years or that same was recorded in a county other than where the land lies, for ten years, there is no law which validates certificates of acknowledgment or deeds with defective certificates, where such defects were due to want of authority in the officer taking same.

(e) Because it is not shown that there has been no adverse claim or inconsistent claim to the one evidenced by said instrument, but on the contrary it affirmatively appears from the pleadings and evidence herein that the interveners herein are claiming and have been for many years adversely and inconsistently to plaintiffs, who claim under said deed.

53.

The court erred to the prejudice of defendants in admitting in evidence as a muniment of title, over the objections of defendants, certified copy of the purported deed from Robert Rose to John N. Rose, dated August 4, 1854, to which defendants in open court excepted, as shown by bill of exceptions herein, and erred in rendering judgment for plaintiffs, based on instrument for the following reasons, to-wit:

(a) Because the certified copy offered is from the deed records of a county other than where the land is situated, and purporting to have been executed in said county and filed when none of the land in controversy was situated in said county, and no land described in said deed is situated in said county, and neither the original deed nor said certified copy is shown to have been recorded in Hardin County, where the land lies, and there is no law which would authorize the admission in evidence of such a certified copy.

(b) Because the record of said deed in a county other than where the land is situated for ten years was not sufficient to cure the invalidity of said acknowledgment.

54.

The court erred to the prejudice of defendants in admitting in evidence over defendants' objections the two letters of A. W. Standing, General Manager of the Houston Oil Company of Texas, to H. G. Brown Supply Co., to which defendants in open court excepted, which objections and exceptions are shown by said bill of exceptions as follows:

"We object to the letters because the date of it shows it was written since the time of the filing of this suit, and the status of the parties could not be affected by the letter or any declaration contained in it. We object further because it is wholly irrelevant and immaterial to any issue in the case, and is offered for the purpose of varying the written contract, the contract is in evidence here, there is no ambiguity about it, and the letter would not be admissible for that purpose."

55.

The court erred to the prejudice of defendants in admitting evidence over the objection of defendants, to which

defendants in open court excepted, as shown by bill of exceptions herein, the testimony of the witnesses, T. E. Danziger, E. K. Ward, Tom Pattillo, N. B. Scott, W. H. Knipple, and Wiley Brackin, Joe Bumstead, and others, to the number of acres in and the extent of sand pit F, because the contracts with reference to said pits was not ambiguous, and oral testimony was not admissible to explain or vary same, and further said witnesses only gave or purported to give their views as to the extent of said sand pit, without professing or claiming to know what was in the minds of the parties to said contracts, and further said testimony was wholly immaterial and irrelevant to any issue in the case, and highly prejudicial to the rights of defendants before the jury.

56.

The court erred to the prejudice of defendants in excluding the testimony of W. A. McClelland to the effect that T. E. Danziger, Secretary of the Texas Builders' Supply Company, stated to him that said Builders' Supply Company was entitled to take sand from any part of the Charles A. Felder league, because said testimony tended to show the manner in which said supply company was holding said Felder league, and the extent of such holding, which error was highly prejudicial to defendants before the jury.

57.

The court erred to the prejudice of defendants in refusing defendants' special charge No. one, wherein defendants asked that the jury be instructed to return a verdict for defendants, for the following reasons, to-wit:

(a) The evidence showed that the Texas Pine Land Association, and the Houston Oil Company of Texas, to-

gether, and each separately, had had and held peaceable, adverse and continuous possession of the tract of land in controversy for the length of time and under the circumstances necessary to mature title under the three years five and ten years statute of limitation, which evidence was so conclusive as to require such instruction.

(b) The undisputed evidence shows that the possession and right to possession of said tract of land by the G. B. & K. C. Railroad was unrestricted by metes, bounds or otherwise, but included the whole of the Charles A. Felder league, or the tract in controversy and continued uninterrupted for more than three years, more than five years, and more than ten years before the filing of this suit, and was accompanied by other elements and circumstances required by law.

(c) That the undisputed evidence by the records show that under the contracts between the Houston Oil Company of Texas and the Texas Builders' Supply Company, said supply company entered upon said tract of land on October 1, 1902, and took sand therefrom, lived thereon, each and every month until the filing of this suit, and that the employes of said supply company continuously resided thereon, during all of which time the Houston Oil Company of Texas claimed said league of land, under deeds duly registered, and paid all taxes thereon, and the possession and occupancy of said Builders' Supply Company was of the entire league, and not in any manner restricted by metes and bounds, or otherwise.

(d) The evidence admitted by the court over defendants' objections as to the extent of sand pit F and the letters of A. W. Standing, General Manager of the Houston Oil Company of Texas, likewise admitted, even if properly admitted, are not sufficient to show that said supply company

was restricted to a small part of said league, so as to prevent it being held that such possession extended by construction to all parts of said league, and under the law as applied to the facts, such possession did extend to and include the entire league.

58.

The court erred to the prejudice of defendants in entering judgment herein on the verdict of the jury, as rendered, for the reason that said verdict is contrary to the law and the evidence, and wholly unsupported by any evidence, in that the great weight of the evidence clearly showed that the Houston Oil Company of Texas from October, 1902, down to the filing of this suit, was in continuous possession of the property in controversy, claiming the same under deeds duly registered, and paying all taxes thereon, such possession being by, through and under the Texas Builders' Supply Company, which the uncontroverted evidence shows have removed sand from said tract of land each and every month from October, 1902, down to the filing of this suit, and there being no evidence to show that the possession of said Builders' Supply Company was in any manner restricted or confined to the portion of said Charles A. Felder league actually held by said Builders' Supply Company and it being further clear that even if the evidence was sufficient to show that said Builders' Supply Company only held a restricted portion of said league, that said Builders' Supply Company were agents and contractors of and under the said Houston Oil Company of Texas, and the holding, occupancy and possession of said Builders' Supply Company would be the holding, occupancy and possession of the Houston Oil Company of Texas.

The court erred to the prejudice of defendants in entering judgment on the verdict of the jury therein, because said verdict is wholly unsupported by the evidence and is in conflict with the evidence, in that it clearly appears from the evidence that the Texas Pine Land Association and the Houston Oil Company of Texas, both and each, from the fall of 1893, until October, 1902, held continuous possession of the tract of land in controversy herein, claiming same under deeds duly registered, paying all taxes thereon, which possession was by and through the G. B. & K. C. Railroad, which was the agent of said Texas Pine Land Association, and of the said Houston Oil Company of Texas, and it clearly appearing from the evidence that said G. B. & K. C. Railroad continuously during said time took sand from the said league of land, and that said railroad was entitled under the contract between it and the Texas Pine Land Association and Houston Oil Company of Texas, to take sand from any portion of said league, and was not restricted in its occupancy and use thereof, and it appearing from the evidence in the case that the Houston Oil Company of Texas and the Texas Pine Land Association were, during said period, otherwise in possession of said tract of land.

The court erred to the prejudice of defendants in refusing to give to the jury defendants' special requested charge No. 21, wherein defendants requested the court to charge the jury that a person in possession of land, either in person or by agent, tenant or lessee, holds to the extent of the boundaries of the land described in his deed, when such person holds under and by virtue of a deed or deeds describing

said tract of land so claimed by him, and the court erred in instructing the jury contrary to said proposition, because the evidence in this case clearly showed that the Houston Oil Company of Texas and its predecessors in title were in possession of the tract of land in controversy, or a part thereof, under deeds describing the whole, and defendants were entitled to have the jury instructed as to the legal effect of such possession.

61.

The court erred to the prejudice of defendants in refusing to give defendants' requested charge Nos. 19 and 20 to the effect that where one has actual possession of a part of a tract of land by virtue of a deed or other writing thereof, though not in actual possession of the entire tract of land, the law construes his possession to embrace all of the tract described in his deed, because the Houston Oil Company of Texas, and those under whom it claims, as shown by the evidence herein, had and held possession of all or a portion of the Charles A. Felder league in Hardin County, for the requisite length of time required by the statute of limitation of three, five and ten years, under a deed or deeds and the defendants were entitled to have the jury instructed as to the legal effect of such holding, and the court further erred in instructing the jury to the contrary.

62.

The court erred to the prejudice of defendants in refusing to give to the jury defendants' special charge No. 22, to the effect that under the contract shown to exist between the Houston Oil Company of Texas and the Texas Builders' Supply Company, that the possession of said Builders' Supply

Company, of a portion of the tract of land in controversy, and of a portion of the Charles A. Felder league, would be possession of the Houston Oil Company of Texas, and if continued for the proper length of time and under proper conditions, would mature title in the Houston Oil Company of Texas, because the evidence in this case showed that such was the legal effect of such contract, and the defendants were entitled to have the court construe said contract, and the court erred in submitting to the jury the question of what was the legal effect of said contract, such legal effect being a question for the court and not for the jury.

63.

The court erred to the prejudice of defendants in submitting the question of what was intended to be included and embraced in the contract between the Houston Oil Company of Texas and the Texas Builders' Supply Company, because such contract or contracts were unambiguous and not uncertain, clear and explicit, and it was the duty of the court to construe said contracts, and there were no questions to be passed upon by the jury.

64.

The court erred to the prejudice of defendants in entering judgment upon the verdict of the jury herein, because said verdict is contrary to the law and the evidence and wholly unsupported by the evidence in that it is clearly shown that the possession of the Texas Builders' Supply Company of a portion of the Charles A. Felder league was in no manner whatsoever restricted, but that same included the entire Charles A. Felder league, and particularly the portion thereof involved in this suit, and because the evidence shows that said

possession was continuous for more than five years and that said holding was that of the Houston Oil Company of Texas, who was claiming said land, under deeds duly registered and the payment of taxes.

65.

The court erred to the prejudice of defendants in refusing to give to the jury defendants' requested instruction No. 23, wherein the defendants requested the court to instruct the jury as to the legal effect of the contract between the Texas Pine Land Association and the Gulf Beaumont and Kansas City Railroad, under which the evidence showed that said railroad took sand from the Charles A. Felder league, both for its own use and for sale to the public, because the uncontroverted evidence in this case clearly showed that the said Gulf, Beaumont and Kansas City Railroad Company was entitled under said contract to take sand from any part or portion of the Charles A. Felder league, and the evidence showed that it went into possession of said Felder league in the fall of 1893 and continued such possession up to October, 1902, during which time vast quantities of sand were taken therefrom, and during all of which time the Houston Oil Company of Texas and its vendors, the Texas Pine Land Association was claiming said tract of land under deed or deeds duly registered and payment of taxes thereon, and the court erred in charging the jury contrary to said requested instruction, and further erred in submitting the question of the extent of said possession and holding by the said G. B. & K. C. Railroad to the jury, because the uncontroverted evidence showed that the contract was, as above stated, and there was no issue of fact for the jury, that it was the duty of the court to con-

strue said contract and charge the jury as to the legal effect thereof.

66.

The court erred to the prejudice of defendants in refusing to give to the jury defendants' requested special charge No. 15 submitting to the jury the issue of three years statute of limitation in favor of defendants herein, because under the uncontroverted facts the Houston Oil Company of Texas and its predecessors in title had and held the Charles A. Felder league of land under title and color of title, as that term is defined by the statutes, of the State of Texas, for more than three years prior to the institution of this suit, and the court erred in failing to give in his charge to the jury the charge on the said three years statute of limitation.

67.

The court erred to the prejudice of defendants in refusing to give to the jury defendants' special requested charge No. 16 submitting to the jury the ten years statute of limitation of the State of Texas, because the evidence showed that the Houston Oil Company of Texas and those under whom it claims, each and all of them had and held peaceable and adverse and continuous possession of the Charles A. Felder league of land in Hardin County, part of which is involved in this suit, for a period of more than ten years prior to the institution of this suit, and the court erred in refusing to include the charge on the ten years statute of limitation in its charge to the jury, and in submitting only the five years statute of limitation, and in charging the jury that if they failed to find for the defendants under said five years statute to find for plaintiffs and interveners, because the

defendants were entitled to have the question of possession under the ten years statute submitted to the jury and there was sufficient evidence to warrant and require the submission of said issue to the jury.

68.

The court erred to the prejudice of defendants in excluding from the jury certified copy of the deed from Charles A. Felder to William A. Daniels, dated June 10, 1839, same being excluded for the reasons set forth and shown by bills of exception herein, to which action of the court the defendants in open court excepted, because said certified copy came from the records of and from the proper county, and under the laws of the State of Texas was admissible as a muniment of title, and the court erred in assuming in its charge to the jury that a deed from the said Charles A. Felder to the said William A. Daniels had not been proven.

69.

The court erred to the prejudice of these defendants in excluding from the jury certified copy of the deed from Charles A. Felder to Joshua Smith, dated May 31, 1840, same being excluded for the reasons set forth and shown by bills of exception herein, to which action of the court the defendants in open court excepted, because said certified copy came from the records from the proper county, and under the laws of the State of Texas, was admissible as a muniment of title, and the court erred in assuming in its charge to the jury that a deed from the said Charles A. Felder to the said Joshua Smith had not been proven.

That each and all of the errors of the court hereinbefore pointed out and set forth were material errors and prejudicial

to defendants, and but for said errors defendants would have recovered judgment herein, and that same were errors upon the substantial law of this case, and were highly prejudicial to these defendants, and tended to and did deprive these defendants of their just and legal rights herein, and were of such a nature as to entitle these defendants to a new trial and new hearing of this cause.

Wherefore, these defendants pray that the judgment heretofore rendered in this cause be set aside, and a new trial be awarded, and that the order overruling defendants' motion for restitution be rescinded, and set aside, and held for naught, and that this cause be placed upon the trial calendar to be tried at a subsequent term of the court, and for all further relief, which under the law defendants are entitled to.

H. O. HEAD
PARKER & KENNERLY

Attorneys for defendants, Houston
Oil Company of Texas, Maryland
Trust Company and Kirby Lum-
ber Company.

Thereupon, in open court, said court entered an order with reference to said motion for new trial, as follows:

On this the 3rd day of December, 1914, came on to be heard in open court the motion for new trial of the Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company, filed on the 2nd day of December, 1914, and it is ordered, adjudged and decreed that same be and it is hereby in all things and respects overruled, to which action of the court said defendants and each of them in open court except and give notice of filing of an application for

writ of error to the Honorable Circuit Court of Appeals for the Fifth Circuit.

GORDON RUSSELL,
Judge.

Thereupon, the defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, in open court presented their motion that they be allowed ninety days after the adjournment of this court within which to prepare, have settled and filed their bill of exceptions. Whereupon, the court entered in said matter the following order:

The above and foregoing motion being presented to me and coming on for hearing in open court, this the 3rd day of December, 1914, it is considered by the court, and hereby ordered, adjudged and decreed that the defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company be and they are hereby granted and allowed ninety days from and after the time of adjournment of this court, in which to prepare have settled and approved and filed their bill of exceptions herein.

Done at Beaumont this the 3rd day of December, A. D. 1914.

GORDON RUSSELL,
Judge.

And the said defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, now here present this, their bill of exceptions in this cause, and pray that same be approved, allowed, filed and settled as such.

H. O. HEAD and
PARKER & KENNERLY

Attorneys for Houston Oil Company
of Texas, Maryland Trust Com-
pany, and Kirby Lumber Com-
pany, Defendants herein.

Presented to us by the counsel for defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, on this the 1st day of Feb. 1915, and examined and approved by us on this the 1st day of Feb. 1915.

W. D. GORDON

Attorney for Plaintiffs.

E. E. EASTERLING

Attorney for Interveners.

And now, on this, the 3rd day of February, 1915, and within the time as fixed and limited by an order of the court, granting ninety days after the adjournment of the court in which defendants might prepare, have approved, settled, allowed and filed their bill of exceptions herein, the above and foregoing bill of exceptions is found correct and is in all respects allowed and settled as the bill of exceptions in this case, and ordered to be filed as a part of the record herein.

Done at Tyler, on this, the 3 day of February A. D. 1915.

GORDON RUSSELL,

U. S. District Judge, Eastern District of Texas.

NOTICE TO TEXAS BUILDERS SUPPLY COMPANY
TO JOIN IN DEFENDANTS' PETITION FOR
WRIT OF ERROR, AND ITS REFUSAL
TO JOIN.

Filed in U. S. District Court on Feb. 1, 1915.

Cause Pending in the District Court of the United States, for the Eastern District of Texas, at Beaumont, Texas.

Cornelia G. Goodrich, et al,

versus

D. L. No. 408.

Houston Oil Company of Texas, et al.

To the Defendant, Texas Builders Supply Company, or its Attorney of Record, Mr.:

The defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, hereby

give you notice under the rules in such cases made and provided, to join with them in the prosecution of a writ of error to the Honorable the United States Circuit Court of Appeals for the Fifth Circuit, at New Orleans, Louisiana, to review the judgment of the United States District Court for the Eastern District of Texas, at Beaumont, rendered in the above styled and numbered cause.

This the 29 day of January A. D. 1915.

HOUSTON OIL CO. OF TEXAS,
MARYLAND TRUST CO.,
KIRBY LUMBER CO.,
Defendants.

By H. O. HEAD,
PARKER & KENNERLY,
Their Attorneys of Record.

Service of the foregoing notice accepted this the 30th day of January A. D. 1915. The Defendant, the Texas Builders Supply refuses to join in the prosecution of the above mentioned Writ of Error.

TEXAS BUILDERS SUPPLY CO.
By T. E. DANZIGER, Secretary,
Its Attorney of Record.

DEFENDANTS' PETITION FOR AUTHORITY TO
PROSECUTE WRIT OF ERROR WITHOUT
JOINDER OF TEXAS BUILDERS SUP-
PLY COMPANY, AND ORDER
THEREON.

Filed in U. S. District Court on Feb. 3, 1915.

To the Honorable Gordon Russell, Judge of said Court:

Come now the defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company, and respectfully represent that in the above styled and

numbered cause they desire to prosecute a writ of error from the Honorable The United States Circuit Court of Appeals for the Fifth Circuit at New Orleans, Louisiana, to the Honorable The District Court of the United States for the Eastern District of Texas, at Beaumont, as is evident by their application for said writ of error now tendered to the court, to review the judgment rendered in this cause on the 1st day of December, A. D. 1914, in favor of the plaintiffs, Cornelia G. Goodrich et als., and interveners, Fannie M. Allan et als. on the one hand, and against these defendants, Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, on the other hand, and that by the terms of said judgment a joint judgment was rendered in favor of said plaintiffs and interveners and against the defendant Houston Oil Company of Texas and the Texas Builders Supply Company in the sum of Twelve Hundred and Eighty-six (\$1286.00) Dollars for damages for the removal of sand from the land in controversy.

That these defendants have given due and legal notice to the defendant Texas Builders Supply Company to join in the prosecution of said writ of error in this cause hereinbefore mentioned, but that said defendant Texas Builders Supply Company has declined and refused to join in the prosecution of said writ of error, as is shown by the notice to said defendant herewith exhibited to the court, and the endorsement on said notice by the said Texas Builders Supply Company of its refusal to join in the prosecution of said writ of error.

Wherefore, defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company pray that said notice and refusal be considered as a summons and a severance herein, and that Your Honor do enter an order

herein allowing these defendants to prosecute said writ of error without the joinder of said defendant Texas Builders Supply Company.

H. O. HEAD,
PARKER & KENNERLY,

Attorneys for Defendants, Houston
Oil Co. of Texas, Kirby Lumber
Company and Maryland
Trust Company.

In Chambers at Sherman, Texas,

This 3rd day of February, A. D. 1915.

The above and foregoing application being presented to me, it is ordered that the defendants Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company be allowed to prosecute their writ of error herein without the joinder of the defendant Texas Builders Supply Company.

GORDON RUSSELL,
United States District Judge for
the Eastern District of Texas.

PETITION OF HOUSTON OIL COMPANY OF TEXAS,
ET AL. FOR WRIT OF ERROR.

Filed in U. S. District Court on Feb. 1, 1915.

To the Honorable Gordon Russell, Judge of said Court:

Come now the Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company, defendants in the above styled and numbered cause, and respectfully represent as follows:

1.

That on the first day of December, A. D. 1914, at a regular term of this court, judgment was rendered by this Hon-

orable Court in this cause against the defendants Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company, in favor of the plaintiffs, Cornelia G. Goodrich, Edward L. Montgomery Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and her husband, Jean Krasica, the heirs of William M. Goodrich, deceased, in favor of the interveners, Fannie M. Allen, Mary M. Stedman, Ophelia M. Cox and her husband Louis L. Cox, for those claiming under James Morgan, deceased, for a certain tract or parcel of land involved in this suit, and also in favor of said named plaintiffs and interveners against the Houston Oil Company of Texas and the Texas Builders Supply Company, a corporation, for certain sums of money; and on the second day of December A. D. 1914, judgment in this cause was rendered denying the petition for restitution of the Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company, all of which is fully shown by the records of this court, to which reference is made, in which judgment, and proceedings had prior and subsequent thereto in this cause, certain errors were committed to the great prejudice of these defendants, Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company, all of which will appear in detail from the Assignments of Error by said defendants, which are filed with this petition.

2.

That said defendants, Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company, are desirous of suing out a Writ of Error herein, and supersedeas herein, to stay all proceedings herein, pending the hearing of this cause in the Appellate Court.

Wherefore these defendants pray that Writ of Error may issue in this behalf, in due form of law, for the correction of the errors complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated as provided by law, may be sent by the Clerk of the said United States District Court for the Eastern District of Texas, to the United States Circuit Court of Appeals for the Fifth Circuit; and that the amount of bond be fixed, and that upon the filing of said bond, conditioned and payable as supersedeas bonds are required to be conditioned and payable, all further proceedings in this cause be stayed until said cause is heard in the Appellate Court.

H. O. HEAD,
OSWALD S. PARKER,
T. M. KENNERLY,
PARKER & KENNERLY,

Attorneys for Defendants, Houston
Oil Co. of Texas, Kirby Lumber
Company, and Maryland Trust
Company.

ASSIGNMENT OF ERRORS

Filed in U. S. District Court on Feb. 1, 1915

Come now the defendants, Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company, and file this their Assignment of Errors upon which they and each of them, will rely in their prosecution of Writ of Error in the above styled and numbered cause, for the reversal of the judgment rendered herein against said defendants, and in favor of the plaintiffs and interveners, as is fully shown by the judgment rendered herein, on December 1, 1914, to which judgment reference is made.

I.

The court erred to the prejudice of these defendants, in failing and refusing to give to the jury defendants' requested charge No. 1, which requested charge No. 1, defendants moved the court to give to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which requested charge No. 1, is in substance as follows:

"You are instructed to render in this cause a verdict in favor of the defendant, Houston Oil Company of Texas, for all the land sued for and claimed by the plaintiffs and the interveners in this cause, as the same is described in the petitions of said plaintiffs and said interveners, and also that the plaintiffs and interveners take nothing as against either of the defendants, Kirby Lumber Company, or the Maryland Trust Company."

A. Because the evidence in this cause showed that the Houston Oil Company of Texas, and those under whom it claims and whose title it has, had and held peaceable and adverse and continuous possession of the land in controversy herein, cultivating, using and enjoying the same for more than ten years prior to the institution of this suit, and that the title of the said Houston Oil Company of Texas to the said land in controversy, is fully matured under and by virtue of the ten years statute of limitation under the laws of Texas, all of which facts are fully shown by the bill of exceptions in this cause, and all of which matters were fully set forth in the motion for the new trial herein.

B. Because the evidence in this cause fully and clearly shows that the Houston Oil Company of Texas, and those

under whom it claims, and whose title it has, has had and held peaceable, adverse and continuous possession of the property in controversy in this suit, cultivating, using and enjoying the same, and paying taxes thereon, and claiming under a deed or deeds duly registered, for more than five years prior to the institution of this suit, and that the title of the Houston Oil Company of Texas to said property is good under the five years statute of limitation under the laws of the State of Texas, all of which is fully shown by the bill of exceptions in this cause, and is fully set forth in defendants' motion for a new trial.

C. Because the evidence in this cause fully and clearly shows that the Houston Oil Company of Texas and those under whom it claims and whose title it has, has had and held peaceable, adverse and continuous possession of the property in controversy, under title and color of title, to-wit, the regular chain of title from and under the sovereignty of the soil, and to-wit, consecutive chain of transfers, for more than three years prior to the institution of this suit, and that the Houston Oil Company of Texas has full and complete title to said property under and by virtue of the three years statute of limitation of Texas, all of which is fully shown by the bill of exceptions herein, and is fully set forth in defendants' motion for new trial.

D. Because the evidence in this cause clearly shows that neither plaintiffs nor interveners were entitled to recover in this cause, in that the evidence clearly showed that the purported deed from Charles A. Felder to John A. Veatch, under which plaintiffs and interveners claim, was not in fact executed by the said Charles A. Felder, but that the same was a forgery.

E. Because the evidence in this case clearly showed that even if the purported deed from Charles A. Felder to John A. Veatch, under which the plaintiffs and interveners claim, was in fact executed and delivered, and was in fact a genuine deed, then defendants claim under and by virtue of a deed from Charles A. Felder to William A. Daniels, which was senior to, and an older deed out of said Charles A. Felder, to the deed under which plaintiffs and interveners claim, and by virtue thereof, defendants were entitled to recover and have judgment, and to have the jury find in their favor, all of which is shown by the bill of exceptions herein, and is fully set forth in the motion for new trial.

F. Because even if the purported deed from Charles A. Felder to John A. Veatch was in fact made, executed and delivered, as claimed by plaintiffs and interveners, that defendants claim under a deed from Charles A. Felder to William A. Daniels, which is a prior deed and an older deed out of the said Charles A. Felder, and was made, executed and delivered by the said Charles A. Felder previous to the date and previous to the execution of the purported deed from Charles A. Felder to John A. Veatch, and the evidence in this case clearly shows that the said John A. Veatch was not the bona fide, innocent purchaser for value of the Charles A. Felder league of land, without notice of the older deed from Charles A. Felder to William A. Daniels, but on the contrary, the evidence in this case clearly shows that the said John A. Veatch did have notice of said deed from Charles A. Felder to William A. Daniels, and that he was not an innocent purchaser for value without notice thereof, and the evidence in this case of all such facts would require the court to instruct the jury to return a verdict in favor of the defend-

ants, and would require the court to enter judgment in favor of defendants.

G. Because even if it be true that Charles A. Felder did make, execute and deliver to John A. Veatch the deed under which plaintiffs and interveners claim, the evidence in this case clearly shows that subsequent thereto he made, executed and delivered to Joshua Smith, a deed conveying the said Chas. A. Felder league, and that by mesne conveyances, title so conveyed to said Joshua Smith, passed to John P. Irvin, and that the said John P. Irvin was a bona fide, innocent purchaser for value of the said Chas. A. Felder league, without notice, either actual or constructive, of the said deed from the said Chas. A. Felder to the said John A. Veatch, or of the claim of the plaintiffs and interveners, or those under whom they claim, and the defendant, Houston Oil Company of Texas, has acquired all of the title by mesne conveyances, owned and held by the said John P. Irvin, and the court in this case should have instructed the jury to return a verdict for defendants, and should have entered judgment for defendants, all of which is fully shown by the bill of exceptions herein, and fully set forth in the motion for new trial herein.

H. Because even if the deed from Chas. A. Felder to John A. Veatch was in fact made, executed and delivered, it is shown by plaintiffs and interveners that the said John A. Veatch thereafter conveyed to one James Morgan, and the evidence clearly shows that the said James Morgan thereafter conveyed the portion of the Charles A. Felder survey in controversy in this suit, to W. D. Lee, and that the title thereto passed by mesne conveyances from the said W. D. Lee to William Walker, and that said title is still outstanding

in the said William Walker or in his heirs, and that neither plaintiffs nor interveners connect themselves in any way whatsoever with the said outstanding title, and it was the duty of the court to instruct the jury to return a verdict for defendants and to enter judgment for defendants, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

I. Because even if the said Charles A. Felder did make, execute and deliver to John A. Veatch a deed conveying the Chas. A. Felder league, the said John A. Veatch thereafter conveyed said league of land to one James Morgan, and thereafter the said James Morgan conveyed a portion of the said league of land in controversy herein, to W. W. Swain, and it has not been shown and was not shown in this cause by legal evidence, that the title to the said portion of the said Chas. A. Felder league in controversy herein, has passed out of the said W. W. Swain, and the legal evidence in this cause showed an outstanding title to said property in the said W. W. Swain, with which neither the plaintiffs nor the interveners in any way connect, and the court should have instructed the jury to return a verdict for defendants and enter judgment for defendants, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

J. Because even if said Chas. A. Felder did in fact make, execute and deliver to the said John A. Veatch, a deed under which plaintiffs and interveners claim, the said title, if any title, passed to the said John A. Veatch, and thereafter passed by mesne conveyances from John A. Veatch et al. to W. W. Swain and Robert Rose, and the legal evidence offered in this cause clearly shows that said title is in

the said W. W. Swain and the said Robert Rose and is outstanding title, and neither plaintiffs nor interveners connect therewith or claim thereunder, and the court in this cause should have instructed the jury to return a verdict for defendants, and should have entered judgment for the defendants, all of which is clearly shown by the bill of exceptions herein, and set forth in the motion for new trial.

K. Because that if it be true that the said Chas. A. Felder did make, execute and deliver to the said John A. Veatch, a deed conveying the Chas. A. Felder league, title so acquired by said John A. Veatch, if any, thereafter passed by mesne conveyances to W. W. Swain and John N. Rose, and the legal evidence offered in this cause clearly shows that the title is outstanding in said W. W. Swain and said John N. Rose, and that neither the plaintiffs nor the interveners have in any manner acquired said title, and that neither the plaintiffs nor the interveners connect therewith, and the court should have instructed the jury to return a verdict for defendants and should have entered judgment for the defendants, all of which is clearly shown by the bill of exception herein, and is set forth in the motion for new trial.

L. Because even if it be true that Chas. A. Felder made, executed and deliver to John A. Veatch, a deed under which plaintiffs and interveners claim, it is likewise true and clearly shown by the evidence herein that the said Chas. A. Felder prior thereto made, executed and delivered to William A. Daniels, a deed to the said Charles A. Felder league, under which defendants claim, and plaintiffs and interveners claiming under the said deed from Charles A. Felder to John A. Veatch, which was the junior deed, wholly fail to show that the said deed from Chas. A. Felder to William A. Daniels was

not presented for record to the clerk of the County Court of Liberty County, in which county said property was then situated, prior to the execution of the deed from Chas. A. Felder to John A. Veatch.

M. Because even if it be true that Charles A. Felder made, executed and delivered to John A. Veatch a deed conveying the Charles A. Felder league in Hardin County, under which plaintiffs and interveners claim, it is clearly shown by the evidence in this cause, that the said Chas. A. Felder had prior thereto, made, executed and delivered to William A. Daniels a deed conveying the said Chas. A. Felder league, under which Daniels deed defendants herein claim, and plaintiffs and interveners wholly fail to show by the evidence in this cause, that the said deed from the said Chas. A. Felder to the said William A. Daniels was not delivered to the clerk of the County Court of Liberty County, in which county the said land was then situated, to be recorded within a reasonable time after the execution and delivery thereof.

N. Because it is clearly shown that if Charles A. Felder did in fact make, execute and deliver to the said John A. Veatch, a deed under which plaintiffs and interveners claim, that the title, if any, acquired by plaintiffs and interveners thereunder, and the claim of the plaintiffs and interveners thereunder is an equitable title and not the legal title, and that if any title plaintiffs and interveners have, that same is an equitable title or right, and that plaintiffs and interveners can not recover thereon in a court of law, and that the court should have instructed the jury to return a verdict for defendants, and should have rendered judgment for the defendants, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

II.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' requested charge No. 3 to the jury, which requested Charge No. 3, defendants requested the court to give to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which requested Charge No. 3, is in substance as follows:

"You are instructed that before plaintiffs and interveners can recover in this suit, they must show title in themselves to the land in controversy. A forged deed does not pass title to land in this state to the vendee named therein, nor to any persons claiming to deraign title from the vendee in such forged deed.

Therefore, if you shall believe from the evidence, that is to say from all the facts and circumstances which the court has permitted to be introduced before you, that the deed which has been offered in evidence by the plaintiffs and interveners, and which purports to have been executed by Charles A. Felder in favor of John A. Veatch on the 18th day of June 1839, under which said deed both the plaintiffs and the interveners in this cause claim title, was not in fact executed by the said Charles A. Felder to the said John A. Veatch, but was a forgery, as claimed by the defendants in this cause, then, regardless of your findings on any other issue, you are instructed to proceed no further, but in such event let your verdict be in favor of the defendant, Houston Oil Company of Texas, for all the land sued for by both the plaintiffs and interveners, and that neither the plaintiffs nor the interveners take anything as against either of the

defendants herein. In this connection you are instructed that whether or not the said purported deed from the said Charles A. Felder to the said John A. Veatch was in fact made and executed by the said Felder to the said Veatch, or whether the same is a forgery, is a question of fact for you to determine from all the facts and circumstances in evidence before you."

Because the evidence in this cause clearly showed that the purported deed from Charles A. Felder to John A. Veatch was not in fact executed by the said Charles A. Felder, but that same was a forgery, and the evidence in this case clearly raised the issue of the forgery of said deed and the defendants were entitled under the law to have the question of the forgery of the said deed submitted to the jury and passed upon by the jury; and the court erred in deciding such question himself, and in deciding that such deed was in fact executed, and in instructing the jury that such deed had been in fact executed; the court erred in rendering judgment for the plaintiffs and interveners, all of which fully appears in the bill of exceptions herein, and is fully set forth in the motion for new trial.

III.

The court erred to the prejudice of these defendants and each of them in refusing to give defendants' requested Charge No. 2, which was presented to the court, and which was requested of the court to give to the jury before the retirement of the jury to consider of its verdict, and while the jury was still at the bar; which requested Charge No. 2 is in substance as follows:

"You are instructed that in determining the issue as to whether or not the purported deed from the said Charles A. Felder to the said John A. Veatch was in fact made and executed by the said Felder, or whether the same was a forgery, as claimed by the defendants herein, you may take into consideration the long claim of ownership asserted to the Felder league of land by the predecessors in title of the defendants and by defendants herein, if any, and the rendition of said land for taxes, if any, and payment of taxes thereon, if any, and the exercise of such acts of ownership as you shall find from the evidence the defendants herein and their predecessors in title exercised, if any, and also the course of dealing, that is to say the sales and transfers of said land among the defendants' predecessors in title, if any."

Because the defendants showed long claim and numerous acts of ownership of the property in controversy, together with payment of taxes and rendition of same for taxes, extending over a period of many years, and plaintiffs and interveners showed no claim to said property other than the filing of the suit herein, and defendants were entitled to have submitted to the jury the issue of whether or not Chas. A. Felder in fact made, executed and delivered to John A. Veatch a deed as claimed by plaintiffs and interveners, and was entitled to have submitted to the jury the circumstances of such long claim and acts of ownership on the part of defendants, and of non-claim on the part of plaintiffs and interveners, and was entitled to have the jury pass thereon, and the court erred in refusing to give such special charge, and erred in failing to so instruct the jury; and the court should

have so instructed the jury, all of which is shown by the bill of exceptions herein, and in the motion for new trial.

IV.

The court erred to the prejudice of these defendants, and each of them, in refusing to give defendants' special charge No. 9, which was presented to the court while the jury was still at the bar, and before it retired to consider of its verdict, which special Charge No. 9 is in substance as follows:

"You are instructed that it is claimed by the defendants in this cause that Charles A. Felder on the 10th day of June, 1839, made, executed and delivered to William A. Daniels a deed conveying to the said Daniels the Charles A. Felder league in Hardin County, Texas, a part of which league of land is in controversy herein, and it is a question of fact for you to determine whether such deed from the said Charles A. Felder to the said Wm. A. Daniels was in fact made, executed and delivered. You are instructed that the making, execution and delivery of a deed may be shown by circumstances. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury, and if you shall believe, upon a consideration of all the facts and circumstances in the case before you, that the circumstances are consistent with the inference or presumption that such a deed was made by the said Felder to the said Daniels, as claimed, and that in view of all the circumstances it is more reasonably probable that such deed was made than that it was not, then the jury is at liberty, and it is the jury's duty to presume and find that such deed,

as claimed, was in fact made, executed and delivered by the said Felder to the said Daniels, and to give the same the effect to which it is entitled, as elsewhere explained in the court's charge."

Because the evidence clearly shows that Chas. A. Felder did, on or about the 10th day of June, 1839, make, execute and deliver to William A. Daniels, the deed conveying the Charles A. Felder league in Hardin County, and the evidence in this case clearly raised the issue of whether or not such deed was in fact made, executed and delivered, and defendants were entitled to have such issue submitted to the jury and were entitled to have the jury find thereon, and such evidence required the court to submit to the jury this issue, and the court erred in deciding such issue himself, and taking such issue from the jury, and erred in deciding such issue against the defendants and rendering judgment upon the verdict of the jury, all of which fully appears in our bill of exceptions, herein and is set forth in the motion for new trial.

V.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special Charge No. 10, which was presented to the court while the jury was still at the bar, and before the jury retired to consider of its verdict, which special Charge No. 10 is in substance as follows:

"You are instructed that if you shall find that on the 10th of June, 1839, Charles A. Felder, to whom the Felder league of land in Hardin County, Texas, was originally granted, made and executed a deed whereby the

said Felder on that date conveyed to one William A. Daniels the said Felder league of land, neither the plaintiffs nor the interveners can recover any portion of the land as claimed by them, unless you shall believe from the facts and circumstances before you that the deed which has been read in evidence before you by the plaintiffs purporting to have been executed by the said Chas. A. Felder on the 18th day of June, 1839, in favor of one John A. Veatch was in fact made and executed by the said Charles A. Felder to the said John A. Veatch, and unless you shall also further find and believe from the facts and circumstances in evidence before you that the said John A. Veatch did not have notice or knowledge at the time he took said deed from the said Felder, if he did, of the prior deed made by the said Felder to the said William A. Daniels, if you find it was so made, executed and delivered, and unless you further find that John A. Veatch paid to the said Felder for said land a valuable consideration."

Because if the said deed from the said Charles A. Felder to the said William A. Daniels was in fact, made, executed and delivered defendants claim thereunder, and if the said deed from Charles A. Felder to John A. Veatch was in fact made, executed and delivered, plaintiffs and interveners claim thereunder, and further because the said John A. Veatch would not have taken title to the property in question unless he was at the time of the taking of said deed from Charles A. Felder a bona fide innocent purchaser for value, without notice of right or claim under the said William A. Daniels deed, and the defendants were entitled to have submitted to

the jury, the question of whether or not the said John A. Veach was, or was not, such bona fide innocent purchaser for value, and were entitled to have the jury pass upon and decide such issue, and the court should have given such special charge and should have instructed the jury in accordance therewith, and should have submitted such issue to the jury, and further, because the evidence in the case clearly presented such issue, and clearly showed that John A. Veatch was not such bona fide, innocent purchaser for value without notice, all of which is fully shown by the bill of exceptions herein, and in the motion for new trial.

VI.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special charge or instruction No. 4, which was presented to the court and requested to be given while the jury was still at the bar and before the jury retired to consider of its verdict, which special charge is in substance as follows:

"If you find that a deed was made, executed and delivered by the said Charles A. Felder to the said William A. Daniels, on the 10th day of June, 1839, conveying to said Daniels the said Charles A. Felder league in Hardin County, Texas, you are charged that the said Daniels would have been entitled to have a reasonable time within which to present same to the clerk of the County Court of Liberty County for record. If you find, therefore, that said deed, if you find that such there was, was presented for record with the clerk of the County Court of Liberty County within a reasonable time after its execution, if you find it was executed, you

will find for defendants, and against plaintiffs and interveners, regardless of what your conclusions may be upon any other questions.

You are the judges of what would be a reasonable time, and in reaching a conclusion you may consider the distance between the place of the execution of said deed, if any, the means and manner of transportation, and the conditions of the country at the time of its execution, if you find it was executed."

Because the evidence in this case clearly showed that the title asserted by the defendants under said William A. Daniels deed is, and has for many years, been the active title to the property in controversy and that the title and claim of plaintiffs and interveners is and has been dormant and inactive for many years. The evidence clearly raised the issue of whether or not the deed from Chas. A. Felder to William A. Daniels was within a reasonable time presented for record in Liberty County, which was the county in which the property in question was then situated, and the defendants were entitled to have the jury pass upon said question and have such issue determined by the jury, and the court should have submitted such issue to the jury, all of which is fully shown in the bill of exceptions herein, and in the motion for new trial.

Via.

"The court erred to the prejudice of these defendants, in charging the jury that the deed from Charles A. Felder to John A. Veatch had been established, and that the same was in fact made, executed and delivered, and that same was not a forgery, and erred in refusing to submit the issue of the

forgery of said deed to the jury for its decision, because it clearly appears from the evidence in this case that said deed was not so made, executed and delivered, and the defendants were entitled to have the jury pass upon such issue and were prejudiced by the charge of the court to the effect that such deed had been made, executed and delivered, all of which is fully shown by bill of exceptions herein.

VIIb.

The court erred to the prejudice of these defendants, in charging the jury that defendants had no title to the property in controversy, unless the jury found that defendants had title under the five years' statute of limitation, because it clearly appears from the evidence in this cause that these defendants had title.

- (a) Under and through the deed from Charles A. Felder to William A. Daniels.
- (b) Under and through the deed from Charles A. Felder to Joshua Smith.
- (c) Under and through the deed from R. O. Lusk to Thomas J. Word.
- (d) Under and by virtue of the three years' statute of limitation.
- (e) Under and by virtue of the ten years' statute of limitation.
- (f) Under and by virtue of presumption of grant, by reason of long claim and acts of ownership, payment of taxes, etc., by these defendants, and non-claim by plaintiffs and interveners.

All of which titles were and are superior to the title asserted by plaintiffs and interveners, all of which is fully shown by bill of exceptions herein.

Vlc.

The court erred to the prejudice of these defendants, in charging the jury as follows, and in rendering judgment in favor of plaintiffs and interveners upon a verdict returned by such jury under such charge:

"Now, if the possession in this case should consist in the taking of sand, and the jury should find from the evidence that it was the intention of the claimant in putting someone in possession to take the sand to occupy no more of the land than necessary to take the sand, and had no intention by that possession to assert title to the whole tract, such an act of possession would not be sufficient to mature title by the five years statute of limitation. On the other hand, I will give you the converse of the proposition: If the claimant in putting someone in possession for the purpose of taking the sand from the land, intended to claim title to all the land and to assert title and dominion over all of it by taking the sand even from a limited portion of the land, then under such circumstances, if the other elements appear, and the claimant had occupied the land under the statute for the full term of five years, the jury would be justified in finding a verdict for the defendant. The mere going upon the land for the purpose of taking the sand, and the occupancy of no more than sufficient of it to take the sand, would not justify the jury in finding under those circumstances the possession of the whole tract, and therefore that limitation extended to the whole tract."

Because the evidence in this case clearly shows that for a period of more than five years defendants, through each the

Gulf, Beaumont and Kansas City Railroad and the Texas Builders' Supply Company, occupied, used and enjoyed a portion of the Charles A. Felder league of land, paying all taxes thereon during said period, such use being by taking sand therefrom and by removing timber therefrom, and by various other occupations thereof, and that said occupancy was under deed duly registered, and was under a chain of title emanating in the sovereignty of the soil, and was under claim of said entire Charles A. Felder league. And because the law is that possession of a portion of a tract of land by a person claiming title thereto under deed or deeds duly registered is possession of the whole, and the facts in this case clearly showed, and the evidence clearly showed, claim of the entire Charles A. Felder league, and it was error for the court to charge the jury that the mere going upon the land for the purpose of taking sand and the occupancy of no more than sufficient of it to take sand did not justify the jury in finding under those circumstances the possession of the whole tract, the evidence clearly showing claim of the whole tract under said deeds, duly registered, by the defendants and their vendors.

Further, because there is no evidence that these defendants, by use of a part of the Charles A. Felder league, did not intend to occupy and claim the whole of it, but the evidence was to the contrary, that they did so claim the whole of said Charles A. Felder league and under such claim were occupying a portion thereof, all of which is fully set forth in bill of exceptions herein, and is set forth in requested charges shown in such bill of exceptions, to which reference is made.

VII.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special charge No. 5, which was presented to the court and requested to be given while the jury was still at the bar and before the jury retired to consider of its verdict, which requested charge is in substance as follows:

"You are instructed that if you shall find from the evidence, that is such facts or circumstances as the court has permitted to go before you, that a deed from the said Charles A. Felder to the said William A. Daniels, dated June 10, 1839, conveying the Charles A. Felder league in Hardin County, Texas, had been executed and delivered, and had been presented to the clerk of the County Court of Liberty County, Texas, for record, at or prior to the time the deed from the said Charles A. Felder to the said John A. Veatch was executed, if it was executed, then you are instructed that the said John A. Veatch had constructive notice of the execution of the prior deed by the said Felder to the said Daniels, if you find that such a deed had been so executed, and that by the execution of the deed from the said Felder to the said Veatch, if the same was executed by the said Felder, no title passed to the said John A. Veatch, and in such event, if you so find the fact to be, your verdict must be in favor of all the defendants herein, as against both the plaintiffs and interveners."

Because the evidence in this case clearly raised the issue of whether or not the deed from Charles A. Felder to William A. Daniels was presented to the clerk of the County

Court of Liberty County for record, prior to the date of the alleged deed from Charles A. Felder to John A. Veatch, the evidence clearly showing that the records of Liberty County had been destroyed, and showing active claim, assertion of ownership and acts of ownership extending over a period of many years under the deed from Charles A. Felder to William A. Daniels, and defendants were entitled to have the jury pass upon the issue and determine the issue of whether or not the deed from Felder to Daniels was in fact presented for record to the clerk of the County Court of Liberty County previous to the date of the purported deed from Chas. A. Felder to John A. Veatch, and the court should have submitted the said issue to the jury, all of which is fully set forth in the bill of exceptions herein, and in the motion for new trial.

VIII.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special charge No. 6, which requested charge was presented to the court and requested to be given while the jury was still at the bar and before the jury had retired to consider of their verdict, which requested charge No. 6 is in substance as follows:

"You are instructed that if you shall believe from the evidence that the purported deed from Charles A. Felder to John A. Veatch, bearing date June 18, 1839, under which the plaintiffs and interveners herein claim, was in fact made and executed by the said Felder to the said Veatch, yet, unless you shall further believe from the evidence that the plaintiffs or interveners have shown that at the time said deed from the said Felder to the

said Veatch was executed, if it was, the deed from the said Felder to the said William A. Daniels, if you shall find that a deed was so made, executed and delivered by said Felder to said William A. Daniels, had not been presented to the clerk of the County Court of Liberty County, Texas, for record, then you will let your verdict be in favor of all the defendants herein, and that neither the plaintiffs nor the interveners take anything by this suit."

Because under the law, the plaintiffs and interveners, before they could recover, were required to show that the deed from Charles A. Felder to William A. Daniels had not been presented to the clerk of the County Court of Liberty County, in which county the property in question was situated for record, prior to the date of the purported deed from Charles A. Felder to John A. Veatch, and the defendants were entitled to have the jury pass upon the issue of whether or not plaintiffs and interveners had so shown, and the evidence clearly raised the issue of whether or not they had so shown, and the court should have given the charge requested, and should have instructed the jury in accordance therewith, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

IX.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special charge No. 7, which was presented to the court and requested to be given to the jury while the jury was still at the bar and before it retired to consider of its verdict, which requested charge No. 7, is in substance as follows:

"You are instructed that if you find that a deed was made and executed and delivered by Chas. A. Felder to William A. Daniels on the 10th day of June, 1839, conveying the Charles A. Felder league in Hardin County, that the presumption is that said deed had been presented to the clerk of the County Court of Liberty County, Texas, for record at the time the purported deed from Charles A. Felder to John A. Veatch was executed, if you find it was executed, and, therefore, unless it has been shown either by facts or circumstances before you that the said deed from the said Felder to the said William A. Daniels, if you find that there was such a deed, had not in fact been presented for record in said Liberty County, Texas, at the time of the execution of the deed from the said Felder to the said Veatch, if you find it was executed by the said Felder, then neither the plaintiffs nor the interveners can recover anything in this suit, and you will find for the defendant."

Because under the law and the facts in this case, taking into consideration the long claim on the part of the defendants under the deed from Charles A. Felder to William A. Daniels, and the acts of ownership extending over a period of many years, and the non-claim on the part of plaintiffs and interveners, claiming under a purported deed from Charles A. Felder to John A. Veatch, the presumption is that the deed from Charles A. Felder to William A. Daniels was presented for record to the clerk of the County Court of Liberty County prior to the date of the purported deed from Felder to Veatch, and the burden of proof was upon plaintiffs and interveners to show that it was not so presented.

and the evidence in this case clearly raised the issue, and defendants were entitled to have the jury pass upon the issue of whether or not plaintiffs and interveners had shown that said deed was not so presented, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

X.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special charge No. 8, which was requested to be given to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which special charge is in substance as follows:

"You are instructed that in reaching a conclusion as to whether Charles A. Felder did or did not on June 10, 1839, make, execute and deliver to William A. Daniels a deed conveying to the said William A. Daniels the Charles A. Felder league of land in Hardin County, Texas, a part of which is in controversy herein, which deed defendants claim to have been so made, executed and delivered, you may consider any claim of title, if any, occupancy, use and enjoyment, if any, of and on the land in controversy by defendants, and those under whom defendants claim, along with the fact that a deed purporting to have been executed by Charles Felder to William A. Daniels, and purporting to have been acknowledged by Charles A. Felder was spread upon the deed record book of Menard County, Texas, on the 23rd day of February, 1842, which record is in evidence before you, together with any other facts in evidence before you which may bear upon said issue."

Because the evidence in this case clearly shows long and active assertion of title by defendants and those under whom they claim, claiming under a deed from Charles A. Felder to William A. Daniels, together with acts of ownership extending over a period of many years, and the evidence further clearly shows non-claim on the part of plaintiffs and interveners, and defendants were entitled to have the jury pass upon the question of whether or not Charles A. Felder did in fact make, execute and deliver a deed as claimed by defendants, and the evidence clearly raised the issue of whether or not such deed was made, executed and delivered, and defendants were entitled to have the jury consider and pass upon such issue, and the fact of such long claim on the part of defendants and of non-claim on the part of plaintiffs and interveners, and the court should have submitted such issue to the jury and should have charged the jury as set forth in such requested charge, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

XI.

The court erred to the prejudice of these defendants and each of them, in refusing to give Defendants' Special Charge No. 11, which was presented to the court and requested to be given to the jury, while the jury was still at the bar and before it retired to consider of its verdict, which special charge No. 11 is in substance as follows:

"You are instructed that if you shall find that the purported deed from the said Charles A. Felder to the said John A. Veatch was in fact executed by the said Charles A. Felder to the said John A. Veatch, then in de-

termining the issue of whether or not the said John A. Veatch paid to the said Charles A. Felder a valuable consideration for the said property, and whether the said John A. Veatch had notice of said deed from Charles A. Felder to the said William A. Daniels, if you find that such a deed was so executed, you may consider the claim of ownership asserted to the Felder league of land by the defendants and those under whom they claim herein, if any, and their rendition of said land for taxes, if any, and their payment of taxes thereon, if any, and the exercise of such acts of ownership as you shall find from the evidence that the defendants herein and those under whom they claim exercised, if any, claiming under the deed to the said William A. Daniels, if any, and also the course of dealing, that is to say the sales and transfers of said land, if any, among the defendants' predecessors in title."

Because the evidence in this case clearly shows that defendants and those under whom they claim, claiming under a deed from Chas. A. Felder to William A. Daniels, have asserted title to the property in controversy for many years, with acts of ownership extending over a period of many years, and the evidence clearly shows non-claim on the part of plaintiffs and interveners and those under whom they claim, and under the law, the defendants were entitled to have the jury consider such evidence in determining the question of whether or not the said John A. Veatch was or was not, a bona fide, innocent purchaser of the property in controversy, without notice of the deed from Chas. A. Felder to William A. Daniels, or the claim thereunder, and the court should have instructed the jury in accordance with such

charge, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

XII.

The court erred to the prejudice of these defendants and each of them, in refusing to give Defendants' Special Charge No. 12, which was presented to the court and requested to be given while the jury was still at the bar, and before it retired to consider of its verdict, which special charge No. 12 is in substance as follows:

"You are instructed that it is claimed by the defendants in this cause that Charles A. Felder on the 21st day of May, 1840, made, executed and delivered to Joshua Smith a deed conveying to the said Smith the Charles A. Felder league, in Hardin County, a part of which league is in controversy herein. It is a question of fact for you to determine whether such deed from the said Felder to the said Smith was in fact made, executed and delivered. You are instructed that the making, execution and delivery of a deed may be shown by circumstances. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury, and if you shall believe, upon a consideration of all the facts and circumstances in the case before you that the circumstances are consistent with the inference or presumption that such a deed was made by the said Felder to the said Smith as claimed, and that in view of all the circumstances it is more reasonably probable that such deed was made than that it was not, then the jury is at liberty, and it is the jury's duty to presume and find that such deed,

as claimed, was in fact made, executed and delivered by the said Felder to the said Smith and to give same the effect to which it is entitled as elsewhere explained in the court's charge."

Because the evidence clearly raised an issue of whether or not said Charles A. Felder did make, execute and deliver to the said Joshua Smith a deed conveying the Charles A. Felder league in Hardin County, and the defendants were entitled to have such issue submitted to the jury, and the court should have submitted such issue to the jury, and the court erred in refusing to submit such issue and deciding such issue himself, and erred in finding that such deed was not in fact, executed, all of which is fully set forth in the bill of exceptions and in the motion for new trial herein.

XIII.

The court erred to the prejudice of these defendants and each of them, in refusing to give Defendants' Special Charge No. 13, which was presented to the court and requested to be given to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which special charge is in substance as follows:

"If you find that on the 21st day of May, 1840, Charles A. Felder made, executed and delivered to Joshua Smith, a deed of that date, conveying to him the Charles A. Felder league of land, a part of which is involved in this suit, then you are charged that same passed by a regular chain of title from Joshua Smith to John P. Irvin, who purchased same from George F. Moore, and wife, on August 4, 1881. You are further charged

that same passed by regular chain of title from said Irvin to the Houston Oil Company of Texas, one of the defendants herein.

Defendants claim that said John P. Irvin was a bona fide innocent purchaser for value of said league of land without notice of the deed from Chas. A. Felder to John A. Veatch, if such a deed there was.

If you find therefore that at the time said John P. Irvin purchased said league of land from George F. Moore and wife he purchased same in good faith, and paid value therefor, and that at said time he had no notice of the alleged deed from Charles A. Felder to the said John A. Veatch, if you find there was such a deed, or of the alleged title or claim thereunder you will find for defendants and against plaintiffs and interveners and this was without regard to your finding on any other issue submitted to you."

Because the evidence clearly shows that Charles A. Felder made, executed and delivered to Joshua Smith on May 21, 1840, a deed conveying the Charles A. Felder league, and that same passed by mesne conveyances to John P. Irvin, and that defendants hold and claim under said John P. Irvin and the evidence further clearly shows that said John P. Irvin was a bona fide innocent purchaser of the Chas. A. Felder league of land in controversy without notice of the purported deed from Chas. A. Felder to John A. Veatch, and the evidence clearly raised this issue, and the defendants were entitled to have the jury pass upon such issue and to decide such issue, and the court erred in refusing to submit such issue to the jury, and in deciding such issue himself, and in

deciding that John P. Irvin was not a bona fide innocent purchaser, all of which is fully shown in the bill of exceptions herein, and is set forth in the motion for new trial.

XIV.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special Charge No. 14, which special charge was presented to the court and requested to be given while the jury was still at the bar, and before it had retired to consider of its verdict, which special Charge No. 14 is in substance as follows:

"You are instructed that in reaching a conclusion as to whether Charles A. Felder did or did not on the 21st day of May, 1840, make, execute and deliver to Joshua Smith the Charles A. Felder league in Hardin County, Texas, a part of which is in controversy herein, which deed defendants claim to have been so made, executed and delivered, you may consider any claim of title, if any, payment of taxes, if any, rendition for taxes, if any, occupancy, use and enjoyment, if any, of and on the land in controversy by the defendants and those under whom defendants claim, you may also consider in this connection the fact that a deed purporting to be dated May 21, 1840, and purporting to have been signed by Charles A. Felder was spread upon the records of Menard County on the 22nd day of March, 1841."

Because the evidence clearly showed claim upon the part of the defendants and those under whom they claim, and acts of ownership extending over a period of many years, and non-claim on the part of the plaintiffs and interveners and those

under whom they claim, and the defendants were entitled to have the jury consider such a fact in determining whether or not the said Charles A. Felder did in fact make, execute and deliver to the said Joshua Smith, a deed conveying the Chas. A. Felder league, as claimed, and the court should have given said charge to the jury and should have instructed the jury in accordance therewith, and erred in not so doing, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

XV.

The court erred to the prejudice of the defendants and each of them, in refusing to give defendants' special Charge No. 15, which was presented to the court and requested to be given to the jury while the jury was still at the bar and before it retired to consider of its verdict, which special Charge No. 15 is in substance as follows:

"You are instructed that among other defenses interposed by the defendants herein, is the statute of limitation of three years, which defense is interposed as against both the plaintiffs and the interveners, and as to this defense you are instructed as follows:

The statute of this state provides that every suit to be instituted to recover land in this state as against any person in peaceable and adverse possession thereof under title or color of title shall be instituted within three years next after the cause of action shall have accrued and not afterward.

By the term 'title' as used above, is meant a regular chain of transfer from or under the sovereignty of soil, and by 'color of title' is meant a consecutive chain of

such transfers down to such person in possession, without being regular, as if one or more of the memorials be only in writing or such like defect as may not extend to or include the want of intrinsic fairness and honesty.

'Peaceable possession' as used above, is such as is continuous for a period of three years, and not interrupted by adverse suit during such period of three years to recover the land.

'Adverse possession' is an actual and visible appropriation of the land, commenced and continued under a chain of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession of land need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them; but in this connection you are instructed that in order to constitute the peaceable and adverse possession above defined, it is not required that the person or persons to whom the deed or deeds are made for the land shall actually be in possession thereof in his own proper person, but it is sufficient to constitute possession if the same is held by an agent or representative or tenant of such persons claiming the land by deed, and that such holding by such agent, representative or tenant is for the person or persons claiming the land under such deed or deeds.

Therefore, if you shall believe from the evidence that the defendant, Houston Oil Company of Texas, or any person or persons under whom it claims by privity, as shown by deeds introduced in evidence, before you

or any two or more of them by an agent, representative or tenant was in peaceable and adverse possession of the Charles A. Felder league of land in Hardin County, Texas, for a period of three successive years at any time before this suit was filed, which was on the 7th day of June, 1911, and that such defendant, Houston Oil Company of Texas, or its predecessors in title during said time were claiming said league of land, or the 2578 acres thereof involved in this suit, under said deed or deeds, then you are instructed to find in favor of the defendant, Houston Oil Company of Texas, for all of the land sued for by the plaintiffs and interveners herein."

Because the evidence clearly shows that defendants and those under whom it claims have been in peaceable and adverse possession of the property in controversy under title and color of title for more than three years before this suit was filed, clearly raising the issue of the statute of three years limitation, and the defendants were entitled to have the jury pass upon the question as to whether or not defendants in fact so had and held peaceable and adverse possession of said premises for a period of three years as aforesaid, all of which is fully shown in the bill of exceptions herein, and is set forth in the motion for new trial.

XVI.

The Court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special charge No. 16, which was presented to the court and requested to be given to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which special Charge No. 16 is in substance as follows:

"The statutes of this state provide that any person who has the right of action for the recovery of any land against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action therefor shall have accrued, and not afterward.

Therefore, if you shall believe from the evidence before you that the defendant Houston Oil Company of Texas, or the Texas Pine Land Association, or both of them together, had and held peaceable and adverse possession of the Felder league of land, by or through another, as agent, employe, or tenant, and that such possession continued for as long a period of time as ten consecutive years, cultivating, using or enjoying the same, then neither the plaintiffs nor the interveners can recover anything in this suit and if you so find the facts to be, your verdict will be for the defendants."

Because the evidence in this case clearly shows that the Houston Oil Company of Texas and its vendor, the Texas Pine Land Association, both separately and together had and held peaceable possession of the Chas. A. Felder league of land by and through another as agent, employe and tenant for a period of more than ten years prior to the institution of this suit, cultivating, using and enjoying the same, and the evidence clearly raised such issue and defendants were entitled to have the jury pass upon same and were entitled to have the jury consider the same, and the court was required under the law and evidence, to give said charge to the jury, and erred in not so doing, all of which is full set forth in the bill of exceptions and the motion for new trial herein.

XVII.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special Charge No. 17 which was presented to the court and requested to be given to the jury while the jury was still at the bar and before the jury retired to consider of its verdict, which special Charge No. 17 is in substance as follows:

"You are instructed that among other defenses interposed by the defendants herein as against the plaintiffs and the interveners is the statute of limitation of five years, and with reference to this defense you are instructed as follows:

The statute of this state provides that every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using and enjoying the same, and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterwards.

By the expression 'peaceable possession' is meant such possession as is continuous for a period of five years, and not interrupted during such period by adverse suit to recover the land.

'Adverse possession' is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.

Peaceable and adverse possession need not be continued in the same person in order to give title to land by

limitation, but when held by different persons successively, there must be a privity of estate between them.

You are further instructed in this connection to constitute the peaceable and adverse possession above defined, it is not necessary or required that the person or persons to whom the deed or deeds for the land is made shall in his own proper person actually occupy the land, but the same may be held and occupied by an agent, representative, employe or a tenant of such person or persons claiming the land under such deed or deeds duly registered.

Therefore, if you shall believe from the evidence that the defendant, Houston Oil Company of Texas, or any person or persons under whom it claims by privity, or any two or more of them was in peaceable and adverse possession of the Charles A. Felder league of land in Hardin County, Texas, or the 2578 acres thereof involved in this suit, by an agent, representative, employe or tenant, cultivating, using or enjoying the same, and paying taxes thereon and claiming the same under a deed or deeds duly registered for a period of five years at any time before this suit was filed, which was on the 7th day of June, 1911, then you are instructed that neither the plaintiffs nor the interveners can recover any portion of the land sued for by them, and you will find for defendants."

Because the evidence clearly shows that defendants and those under whom they claim have through agent, representative, and employe, had and held peaceable, adverse and continuous possession of the property in controversy, holding

same under deed or deeds duly registered, paying all taxes thereon for more than five years prior to the institution of this suit, and defendants were entitled to have such issue submitted to the jury and to have the jury pass thereon, and the court erred in refusing to give such charge to the jury, all of which is fully shown in the bill of exceptions herein, and is set forth in the motion for new trial.

XVIII.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special Charge No. 19, which was presented to the court and requested to be given to the jury while the jury was still at the bar and before it had retired to consider of its verdict, which special Charge No. 19 is in substance as follows:

"You are instructed that where one has actual possession of any part of a tract of land claimed by him, by virtue of a deed or other writing, though not in actual possession of the entire tract conveyed by said deed, still, in law, his possession of a part of the same is the possession of all of said tract so described in his deed.

Therefore, if from the evidence you believe that the Houston Oil Company of Texas, or those under whom it claims, claimed all of the land in controversy under and by virtue of a deed or deeds or other writings, and so claiming all of the land in controversy, entered into and upon and took possession of a part of said land, such possession of a part thereof would, in law, be a possession to the extent of the land described in said deed or deeds, and such possession, if any, would be co-extensive with the boundaries designated in such deed or deeds."

Because one of the controverted issues in this case was whether or not possession by the defendants of the Chas. A. Felder league, was sufficient and constituted possession of the entire league, and the defendants were entitled to have the jury instructed as to the law applicable to such issue, as set forth in said charge, all of which is fully set forth in the bill of exceptions and motion for new trial herein.

XIX.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special charge No. 20, which was presented to the court and requested to be given to the jury while the jury was still at the bar, and before it had retired to consider of its verdict, which special charge No. 20, is in substance as follows:

"You are instructed that if you believe from the evidence that the Houston Oil Company of Texas, or those under whom it claims, claimed the Charles A. Felder league, or the 2578 acres thereof in controversy herein, by virtue of a deed or deeds, and you further believe from the evidence that while so claiming under said deed or deeds, if any, it, they, or their agents, tenants or lessees, if any, entered into and upon, and reduced to possession, a part of said land, then you are instructed further that such possession, if any, of said Houston Oil Company of Texas, or those under whom it claims, of a part of said land, in law would be the possession of the whole of said land so claimed by it or them under and by virtue of said deeds to it or them, if any."

Because the evidence in this case clearly showed that the defendants and those under whom they claim, were in possession of a portion of the Charles A. Felder league, and defendants were entitled to have the jury instructed as to the law on possession of portion of said league under claim of the whole league, and were entitled to have the jury instructed and informed as to what was the law as set forth in said charge, all of which is fully shown by the bill of exceptions herein, and is set forth in the motion for new trial.

XX.

The court erred to the prejudice of these defendants and each of them, in refusing to give defendants' special charge No. 21, which was presented to the court and requested to be given while the jury was still at the bar, and before it retired to consider of its verdict, which special charge No. 21, is in substance as follows:

"You are instructed that a party in possession of land, either in person or by his agent, tenant or lessee, holds to the extent of the boundaries of the land described in his deed, when he holds and claims under and by virtue of a deed or deeds, describing such tract of land so claimed by him."

Because one of the controverted issues in this case was whether or not possession of a portion of the tract of land in controversy was possession of the whole, and the defendants were entitled to have the jury instructed as to the law applicable to such question and as contained in such requested charge, and were entitled to have the jury informed as to the

law, in passing upon such question; and the court erred in refusing to give such charge, all of which is fully shown in the bill of exceptions herein and in the motion for new trial.

XXI.

The court erred to the prejudice of these defendants, in failing and refusing to give to the jury, defendants' special requested charge No. 18, which requested charge No. 18 defendants moved the court to give the jury while the jury was still at the bar, and before it retired to consider of its verdict, which requested charge No. 18 is in substance as follows:

"You are instructed that it is claimed by the defendants in this cause as against the interveners only that James Morgan on the 21st day of November, 1844, executed and delivered to one William W. Swain, a deed conveying to the said Swain 2578 acres of land out of the said Charles A. Felder league, being the same land that is in controversy herein. You are instructed that neither the deed nor a certified copy from the said Morgan to the said Swain so claimed to have been executed and delivered has been introduced in evidence before you, and it is therefore a question of fact for you to determine whether such deed from the said Morgan to the said Swain was in fact made and delivered; and in this connection you are instructed that the execution and delivery of a deed may be shown by circumstances, if in the opinion of the jury such circumstances bearing on that issue are sufficiently strong to show such fact and the jury is at liberty to determine whether they will indulge the presumption that a deed was in fact executed

and delivered by the said James Morgan to the said William W. Swain, conveying said land to the said Swain. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury; and in this connection you are instructed that if you shall believe, upon a consideration of all the facts and circumstances in the case before you (those which the jury may believe to repel, as well as those which the jury may believe to favor such presumption), that the circumstances are consistent with the inference or presumption that such a deed was made by the said Morgan to the said Swain as claimed, and that in view of all the circumstances it is more reasonably probable that such deed was made than that it was not, then the jury is at liberty to presume and find that such deed, as claimed, was in fact made and delivered by the said Morgan to the said Swain; and if the jury, deciding the issues in favor of the weight of the evidence on this point, to be determined by them, do so presume and find, then you are instructed that the interveners herein can recover nothing in this suit, and in such event you will find that the interveners take nothing herein, and this will be so without regard to the other issues submitted herein, and also without regard to what your verdict shall be as between the plaintiffs and the defendants herein."

Because if a deed from the said James Morgan to the said William W. Swain, dated November 21, 1844, was in fact made, executed and delivered by the said James Morgan to the said William W. Swain, conveying 2578 acres of land out of the Charles A. Felder league, and the land involved

in this suit, the interveners, to-wit, the heirs of James Morgan, herein could not recover under any theory of the case, except by virtue of the agreement made in this cause between the plaintiffs and such interveners, and could then only recover by virtue of whatever title may have been shown to be in plaintiffs; and further because it was clearly shown by the legal evidence herein that the plaintiffs had in no manner whatsoever acquired whatever title, if any, the said William W. Swain took under the deed from James Morgan, but it is clearly shown by the legal evidence herein that if the deed was in fact executed from the said James Morgan to the said William W. Swain, there is an outstanding title, in either the said William W. Swain or his vendees, with which neither the plaintiffs nor interveners in any manner whatsoever connect; and further because, if the interveners were entitled to recover at all, they are not entitled to recover 2578 acres, but a very much less quantity, in that it is neither contended nor shown by the plaintiffs that they acquired more than 1721 acres from the said William W. Swain; and the court erred in rendering judgment for plaintiffs and interveners and in refusing to submit the issue of the execution of the deed from James Morgan to William W. Swain to the jury, as between interveners and defendants, all of which is fully shown by bill of exceptions herein and in the motion for new trial.

XXII.

The court erred to the prejudice of these defendants, in failing and refusing to give to the jury defendants' special requested charge No. 22, which requested charge defendants moved the court to give the jury while the jury was still at the bar, and before the jury had retired to consider of its

verdict, which requested charge No. 22 is in substance as follows:

"You are instructed that, under the contract or contracts, if any, between the Houston Oil Company of Texas and the Texas Builders' Supply Company as shown by the evidence before you, an entry under said contract or contracts, if any, upon said land in controversy herein and use thereof, if any, by said Texas Builders' Supply Company was, in law, an entry upon and use of said land by said Houston Oil Company of Texas.

And you are further instructed that if you believe, from the evidence before you, that the Texas Builders' Supply Company, under said contract or contracts, if any, did enter upon the land in controversy herein, and did remove sand therefrom, or did otherwise use or enjoy same, such acts, if any, in removing sand or otherwise using or enjoying said land, would, if continued for the proper length of time, under a claim of right and ownership, as elsewhere explained to you in this charge, be sufficient to constitute title in favor of defendant Houston Oil Company of Texas; and you should find for the defendants."

Because the undisputed and uncontroverted evidence clearly showed that the Texas Builders' Supply Company entered upon said tract of land, to-wit, the Charles A. Felder league, on or about October 1, 1902, for the purpose of removing sand therefrom, and did continuously remain in possession thereof and remove sand therefrom, from said date up to the filing of this suit, and up to the filing of the

petition in intervention by interveners herein, and that such entry and such removal of such sand was under a contract or contracts between the Houston Oil Company of Texas and the Texas Builders' Supply Company, and that same was under a claim of right and ownership by the Houston Oil Company of Texas of said land or premises, and said charge correctly presented to the jury the law with reference to such possession, and defendants were entitled to have the jury instructed upon the law governing such possession, and the court erred and should have given said charge to the jury, and its refusal so to do was prejudicial to these defendants, and the court erred in rendering judgment on the verdict of the jury in favor of the plaintiffs and interveners, all of which is fully set forth in the bill of exceptions herein and in the motion for new trial.

XXIII.

The court erred to the prejudice of these defendants, in failing and refusing to give to the jury defendants' Special Requested Charge No. 23, which Requested Charge No. 23 defendants moved the Court to give to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which Special Requested Charge No. 23 is in substance as follows:

"You are instructed that, under the contract or contracts, if any, between the Texas Pine Land Association and the Gulf, Beaumont and Kansas City Railroad Company as shown by the evidence before you, an entry under said contract or contracts, if any, upon said land in controversy herein and use thereof, if any, by said Gulf, Beaumont and Kansas City Railroad Company

was, in law, an entry upon and use of said land by said Texas Pine Land Association;

And you are further instructed that if you believe, from the evidence before you, that the Gulf, Beaumont, and Kansas City Railroad Company, under said contract or contracts, if any, did enter upon the land in controversy herein, and did remove sand therefrom, or did otherwise use or enjoy same, such acts, if any, in removing sand or otherwise using or enjoying said land, would, if continued for the proper length of time, under a claim of right and ownership, as elsewhere explained to you in this charge, be sufficient to constitute title in favor of defendant Houston Oil Company of Texas; and you should find for the defendants."

Because the evidence clearly showed that, under a contract between the Texas Pineland Association and the Gulf, Beaumont and Kansas City Railroad Company, the said Gulf, Beaumont and Kansas City Railroad Company entered upon the Charles A. Felder League in controversy in this suit, for the purpose of removing, under said contract, sand therefrom, and did remove sand therefrom, from on or about the first of January, 1894, up to on or about the first of October, 1902, and that said entry and said removal of said sand was under a claim by the Texas Pine Land Association of said land up to the time the said Texas Pine Land Association conveyed said land to the Houston Oil Company of Texas, and that thereafter the said possession of said premises and the removal of said sand, up to the first of October, 1902, was under a continuation of said contract between the Houston Oil Company of Texas and the said Gulf, Beaumont and Kansas City

Railroad Company, and the said Charge correctly stated the law applicable to such possession, and the defendants were entitled to have the court instruct the jury as to the law relative to such possession and occupancy, and defendants were prejudiced by the refusal of the Court so to instruct the jury, and the Court erred in failing to so instruct the jury and erred in rendering judgment on the verdict of the jury in favor of plaintiffs and interveners, all of which is fully shown by the bill of exceptions and motion for new trial herein.

XXIV.

The court erred to the prejudice of these defendants, by failing and refusing to give to the jury defendants' Special Requested Charge No. 26, which requested charge No. 26 the defendants moved the Court to give to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which requested charge No. 26 was as follows: "

"You are charged that under the evidence offered in this case the plaintiff Mary W. Montgomery and her husband E. L. Montgomery have not shown themselves entitled to recover against defendants herein, and you will return your verdict that said Mary W. Montgomery and her husband E. L. Montgomery take nothing, and this without regard to what your findings may be on any other issue in the case, or as to any other party to the suit."

Because the uncontroverted evidence in this case clearly shows, in that the will of William M. Goodrich under whom Mary W. Montgomery claims title clearly shows, that the said Mary W. Montgomery has no interest whatsoever in the land in controversy herein, and has no interest whatsoever in any

cause of action for damages against these defendants for sand removed from said tract of land, in that no title in and to said tract of land passed to the said Mary W. Montgomery by the will of the said William M. Goodrich; and the court erred in rendering judgment for said Mary W. Montgomery for said tract of land or any part thereof and for any damages by reason of the removal of sand from said tract of land, all of which is shown by the bill of exceptions herein and by motion for new trial.

XXV.

That, even though plaintiffs and interveners were entitled to judgment for the land in controversy herein, the Court erred to the prejudice of these defendants in rendering judgment in favor of plaintiffs and interveners for the sum of Twelve Hundred and Eighty-six Dollars for damages, because it clearly appeared from the evidence in this cause that the only damages for which a recovery could be had against these defendants was for sand removed from the tract of land in controversy, and it clearly appears from the testimony of T. E. Danziger, Secretary of the Texas Builders Supply Company, that there was removed, from September 1, 1910, to September 1, 1912, during a period which was not barred by the statute of limitation 905 cars of sand, of the value of Twelve Hundred and Eighty-six Dollars, and it further clearly appears from the evidence herein that interveners are claiming herein as the heirs of James Morgan, deceased, and that there are other persons who are the heirs of the said James Morgan, who are tenants in common with the said interveners of said land, and said other persons are not parties to this suit, and, under the law, no recovery can be had of damages for injury to a tract of land by one tenant in com-

mon, of damages which belong to another tenant in common, not a party to the suit.

XXVI.

That, even though plaintiffs and interveners were entitled to judgment for the land in controversy herein, the Court erred to the prejudice of these defendants, in rendering judgment in favor of plaintiffs and interveners for the sum of Twelve Hundred and Eighty-six Dollars for damages, because it clearly appeared from the evidence in this cause that the only damages for which a recovery could be had against these defendants was for sand removed from the tract of land in controversy, and it clearly appears from the testimony of T. E. Danziger, Secretary of the Texas Builders Supply Company, that there were removed, from September 1, 1910 to September 1, 1912, during a period which was not barred by the statute of limitation, nine hundred and five cars of sand, of the value of Twelve Hundred and Eighty-six Dollars. And it further clearly appears from the evidence herein that plaintiffs are claiming herein as the devisees under the will of W. M. Goodrich, deceased, and that there are other persons who are heirs of the said W. M. Goodrich, or devisees of the said W. M. Goodrich, who are tenants in common with the said plaintiffs of said land, and that said other persons are not parties to this suit and, under the law, no recovery can be had of damages for injury to a tract of land by one tenant in common, of damages which belong to another tenant in common, not a party to the suit.

XXVII.

That even though plaintiffs and interveners were entitled to judgment for the land in controversy herein, the court er-

red to the prejudice of these defendants, in rendering judgment in favor of plaintiffs and interveners in the sum of Twelve Hundred and Eighty-six Dollars for damages, because it clearly appeared from the evidence in this case that the only damages for which a recovery could be had against these defendants was for sand removed from the tract of land in controversy, and it clearly appears from the testimony of T. E. Danzinger, Secretary of the Texas Builders Supply Company, that there were removed, from September 1, 1910, to September 1, 1912, during a period which was not barred by the statute of limitation, nine hundred and five cars of sand, of the value of Twelve Hundred and Eighty-six Dollars, and it further clearly appears from the evidence herein that defendants are not liable for any other damages whatsoever to said tract of land, other than the removal of said nine hundred and five cars of sand. And it further clearly appears that if plaintiffs and interveners own any interest in said tract of land, to-wit, the Charles A. Felder League, in Hardin County, Texas, or any part thereof, such interest is an undivided interest, and that persons, other than plaintiffs and interveners, and who are not parties to this suit, own the other undivided interests therein and own other undivided interests in and to the portion of said Felder League involved in this suit, and that persons, other than plaintiffs and interveners, are tenants in common with said plaintiffs and interveners in and to the land involved in this suit, and that such other persons are not parties to this suit and are not in any way bound by the judgment in favor of plaintiffs and interveners against defendants for such damages, and are not in any way estopped from prosecuting a suit against these defendants for their portion of such damages.

because one tenant in common, cannot under the law, recover damages for another tenant in common, not a party to the suit, but can only recover such portion of such damages to which the tenant in common bringing the suit may be entitled.

XXVIII.

The court erred to the prejudice of these defendants in rendering judgment herein for plaintiffs and interveners, because even though there be sufficient evidence to support the finding of the court or the jury that a deed was made, executed and delivered by the said Charles A. Felder to the said John A. Veatch, on June 18, 1839, there is likewise sufficient evidence to support and require a finding that said Charles A. Felder conveyed the same property to William A. Daniels on June 10, 1839, by deed of that date, under which deed defendants claim by regular chain of title, and further, because it appears that the said John A. Veatch could not have been protected, and he and his vendees and those who claim under said deed, cannot be protected as bona fide innocent purchasers for value, because the deed from the said Felder to the said Veatch is not and does not purport to be a deed conveying the title, but is only a quitclaim deed.

XXIX.

The court erred to the prejudice of these defendants, in rendering judgment for plaintiffs and interveners herein, because, even though there be sufficient evidence to support the finding of the court that a deed was made, executed and delivered by the said Charles A. Felder to the said John A. Veatch, on June 18, 1839, there is likewise sufficient evidence to support and require the finding that said Charles A.

Felder conveyed the same property to William A. Daniels on June 10, 1839, by deed of that date, under which deed defendants claim by regular chain of title; and because it clearly appears that whatever title, if any, the said John A. Veatch took under the deed of June 18, 1839, if in fact said deed was executed, was an equitable claim or right and not a legal title or claim, and that whatever rights plaintiffs and interveners have, claiming under said deed to the said John A. Veatch, is an equitable title or right or claim, and not the legal title or right or claim, and that this is a suit in a court of law and a suit at law, and plaintiffs and interveners cannot recover upon an equitable title or claim in a court of law.

XXX.

The court erred to the prejudice of these defendants, in entering judgment for plaintiffs and interveners for the land in controversy and for damages thereto against these defendants, because it is clearly shown by the evidence in this cause that plaintiffs' and interveners' title, if any they have, is not the legal title, but that plaintiffs' and interveners' title and claim, if any they have, is an equitable title and claim which cannot be maintained in a court of law, and which cannot form a basis of a recovery by plaintiffs and interveners in a suit at law, all of which fully appears from the bill of exceptions in this cause.

XXXI.

The court erred to the prejudice of these defendants, in entering judgment for plaintiffs and interveners in this cause for the land sued for and for damages thereto, and in assuming and finding that plaintiffs and interveners had title

to said land unless defendants had acquired title by limitation, and erred in so instructing the jury, because the evidence in this case clearly showed that the purported deed from Charles A. Felder to John A. Veatch, and under which plaintiffs and interveners claim, was a forgery, and that same was never, in fact, executed by the said Charles A. Felder to the said John A. Veatch.

XXXII.

The court erred to the prejudice of these defendants, in entering judgment for plaintiffs and interveners in this cause for the land sued for and for damages thereto, because the evidence in this case clearly showed that, even though Charles A. Felder did execute to John A. Veatch, on June 18, 1839, a deed conveying the Charles A. Felder league in Hardin County, Texas, it likewise clearly showed that the said Charles A. Felder, by deed dated June 10, 1839, had already conveyed the same property to William A. Daniels, under which deed the defendants claim and deraign title by regular chain of title; and the evidence further clearly showed that the said John A. Veatch was not at the time of the execution to him of the deed on June 18, 1839, if in fact it was so executed, a bona fide innocent purchaser for value of said Charles A. Felder league without notice of the title and claim of the said William A. Daniels, but on the other hand, the evidence clearly showed, and the presumptions are under the law by reason of the long claim of the defendants under said deed to the said William A. Daniels, that the said John A. Veatch was not such bona fide innocent purchaser and was not a purchaser for value, and that he did have notice of the title and claim of the said William A. Daniels.

XXXIII.

The court erred to the prejudice of these defendants, in rendering judgment for plaintiffs and interveners for the land sued for and damages thereto, because the evidence clearly shows that, even though Charles A. Felder, on June 18, 1839, made, executed and delivered to John A. Veatch a deed conveying the Charles A. Felder league, the evidence further clearly shows that the said Charles A. Felder had prior thereto, on June 10, 1839, by deed of that date, conveyed the same property to William A. Daniels, under which deed defendants claim and deraign title by regular chain of title, and it is not shown by the plaintiffs and interveners, and not shown by the evidence herein, that the said deed from Charles A. Felder to William A. Daniels was not presented for record to the Clerk of the County Court of Liberty County, in which county the property in controversy was then situated, prior to the 18th day of June, 1839, and prior to the date of the deed from Charles A. Felder to John A. Veatch, it appearing that the deed records of Liberty County had long since been destroyed by fire.

XXXIV.

The court erred to the prejudice of these defendants, in entering judgment for plaintiffs and interveners in this cause for the property sued for and for damages thereto, because, even though Charles A. Felder, on the 18th day of June, 1839, made, executed and delivered to John A. Veatch deed conveying the Charles A. Felder League in Hardin County, it clearly appears from the evidence that the said Charles A. Felder had previously and prior thereto, to-wit, on June 10, 1839, conveyed the same property to William A. Daniels,

by deed of that date, and it clearly appears from the evidence herein and by reason of the long claim of these defendants by regular chain of title under said deed to the said William A. Daniels and the non-claim on the part of plaintiffs and interveners, the presumptions are that the deed from the said Charles A. Felder to the said William A. Daniels was duly presented to the Clerk of the County Court of Liberty County, in which county said property was situated, for record prior to the date of the alleged deed from the said Charles A. Felder to the said John A. Veatch.

XXXV.

The court erred to the prejudice of these defendants, in rendering judgment for plaintiffs and interveners for the property involved in this suit and damages thereto, because, even though the said Charles A. Felder made, executed and delivered to John A. Veatch on June 18, 1839, a deed to the Charles A. Felder league, the evidence clearly shows that the said Charles A. Felder had previously conveyed the same property to William A. Daniels by deed dated June 10, 1839, under which deed defendants deraign title by regular chain of title, and the evidence further clearly shows that said deed from the said Charles A. Felder to the said William A. Daniels was presented for record to the Clerk of the County Court of Liberty County, in which county the land at that time was situated, within a reasonable time after the execution thereof, and plaintiffs and interveners have wholly failed to show that such deed was not so presented for record within a reasonable time after the execution thereof; and because, it will be presumed, by reason of the long claim and acts of ownership shown by the defendants and their vendors,

and by reason of the non-claim on the part of the plaintiffs and interveners, that such deed was so presented for record within a reasonable time after the execution thereof.

XXXVI.

The court erred to the prejudice of these defendants in entering a judgment against these defendants and in favor of plaintiffs and interveners, for the property involved in this suit and for damages thereto, because, even though Charles A. Felder made, executed and delivered to John A. Veatch, on June 18, 1839, a deed conveying the Charles A. Felder league in Hardin County, Texas, it clearly appears from the evidence that the said Charles A. Felder had, prior thereto and on June 10, 1839, by deed of that date, conveyed said property to William A. Daniels, under whom defendants de-
raign title by regular chain of title; and because plaintiffs and interveners, claiming under the said purported deed from Charles A. Felder to John A. Veatch, wholly failed to show that John A. Veatch was at the time of the execution and delivery to him of said alleged deed a bona fide innocent purchaser for value thereof without notice of the prior deed to the said William A. Daniels and without notice of the claim of the said William A. Daniels of said Felder league.

XXXVII.

The court erred to the prejudice of these defendants, in rendering judgment for plaintiffs and interveners for the property in controversy and for damages thereto, because, even though Charles A. Felder made, executed and delivered to John A. Veatch a deed conveying the Charles A. Felder league in Hardin County, Texas, it clearly appears from the evidence that the said Charles A. Felder, on May 21, 1840,

made, executed and delivered to Joshua Smith, a deed conveying the said Charles A. Felder league in Hardin County, a part of which is in controversy herein; and it clearly appears from the evidence that John P. Irvin deraigned title under the said deed from the said Charles A. Felder to the said Joshua Smith to the said Charles A. Felder league, and that the defendants deraign title by regular chain of title under the said John P. Irvin to said property. And it further clearly appears from the evidence that the said John P. Irvin was a bona fide innocent purchaser for value for said league of land, claiming under the said deed from the said William A. Daniels to the said Joshua Smith without notice, either actual or constructive, of the purported deed from the said Charles A. Felder to the said John A. Veatch, or the claim of any person whatsoever thereunder.

XXXVIII.

The court erred to the prejudice of these defendants, in rendering judgment for plaintiffs and interveners for the land sued for and for damages thereto, and erred in assuming and finding that these defendants had no title to the land in controversy unless these defendants had title under the Five Years' Statute of Limitation, which the court submitted to the jury, because it clearly appears from the evidence in this cause, and it is undisputed, that these defendants have a regular chain of title by regular conveyances from and under Thomas J. Word. And it further clearly appears from the evidence in this cause that the said Thomas J. Word deraigned title to the Charles A. Felder league from and under the sovereignty of the soil under and by virtue of the following chain of title:

(a) Original grant from the Government of Texas to Charles A. Felder.

(b) Deed from Charles A. Felder to William A. Daniels, dated June 10, 1839.

(c) Deed from Charles A. (F.) Felder to Joshua Smith, dated May 21, 1840.

(d) Deed from William A. Daniels to Thomas J. Word, dated February 5, 1855.

(e) Deed from Joshua Smith to Mary E. Brown, dated February 27, 1850.

(f) Deed from Mary E. Brown Frazier and husband to Thomas J. Word, dated January 19, 1856.

(g) Proof that Mary E. Brown married one Frazier.

And it further clearly appears that the said chain of title was and ever has been the active title to said property, and that same is the legal title thereto, and that same is superior in all respects to the title acquired by plaintiffs and interveners, or any title they did acquire under the purported deed from Charles A. Felder to John A. Veatch.

XXXIX.

The court erred to the prejudice of these defendants, in admitting in evidence the purported deed from Charles A. Felder to John A. Veatch, purported to bear date of June 18, 1839, and in rendering judgment for plaintiffs and interveners thereon for the land in controversy and for damages thereto, because an affidavit of forgery was filed to said deed, which affidavit of forgery denied the execution of said deed, the acknowledgment thereof, and the filing of same for record, as on the date and at the time purported to have been endorsed on same by the Clerk of Liberty County, and

there was not sufficient evidence to warrant the court in assuming that said deed had been executed, that it had been acknowledged, or that it had been filed for record in Liberty County on the 4th day of November, 1839, there being no evidence or corroborating circumstances to show that the endorsement on said purported deed was made by the recorder of Liberty County, Texas, or that said endorsement and signature by George W. Miles, the purported recorder of Liberty County, Texas, was in the handwriting of said George W. Miles, if he was such recorder, and it is not shown that said George W. Miles was the recorder of Liberty County, Texas.

XL.

The court erred to the prejudice of these defendants in overruling defendants' motion, and in sustaining plaintiffs' and interveners' objections and exceptions thereto, and in rendering judgment in favor of plaintiffs and interveners, in which motion defendants moved the court to require plaintiffs and interveners to make restitution of the sums of money collected by plaintiffs and interveners under and by virtue of the former judgment in this cause, which was reversed, and in which defendants moved the court to require plaintiffs and interveners to make restitution of the property involved in this suit, seized under writ of possession under the former judgment rendered in this cause, and reversed, all of which is fully shown by defendants' motion, and plaintiffs' and interveners' exceptions thereto, in the record in this cause. Because when the judgment of the court rendered on the first trial of this cause was reversed and set aside by the appellate court and the mandate returned to this court by the appellate

court, there was no authority in law for plaintiffs and interveners to retain the money collected under execution under such former judgment, and to retain possession of the property involved in this suit, which was turned over to them by the writ of possession issued on the former judgment in this cause, and these defendants were entitled to be placed back in possession of said premises as they were previous to the rendition of the judgment which was rendered on the first trial of this cause.

XLII.

The court erred in requiring defendants to go to trial in this cause upon the merits, until plaintiffs and interveners had restored to defendants the property involved in this suit, and the money taken and collected by plaintiffs and interveners by virtue of and under the former judgment in this cause, which was reversed. Because these defendants were entitled to be placed back in the same position before going to trial that they were in at the filing of this suit, and that they were in previous to the rendition of the judgment which was rendered on the first trial of this suit, under which writ of possession was issued and defendants ejected, which judgment was reversed by the Appellate Court.

XLIII.

The court erred to the prejudice of these defendants, in refusing, upon the reversal of the judgment rendered in this cause upon the first trial hereof, to require plaintiffs and interveners to make restitution of the premises involved in this suit which were turned over to them by writ of possession issued on such former judgment, and in failing and refusing to require plaintiffs and interveners to return and restore to

these defendants the money collected from them under execution issued under such former judgment, because these defendants were entitled to have possession of the said premises after the reversal of said judgment and to have restored to them said money in order that they might not be deprived of the use and possession of said premises and the enjoyment thereof in the same manner which they had possession of and were enjoying same previous to the rendition of said judgment, and in order that they might, by filing proper bonds in case judgment at the second trial went against them, retain possession of said premises, pending the appeal.

XLIII.

The court erred to the prejudice of these defendants in refusing to rule upon these defendants' motion for restitution previous to the trial of this cause and requiring defendants to go to trial without having the property involved in this suit, and the money paid under execution under judgment at first trial of this cause, which judgment was reversed, restored to them, because defendants were entitled to a ruling upon said motion and were entitled to have said property and money restored to them before being required to go to trial in this cause.

XLIV.

The court erred to the prejudice of these defendants, in refusing to give defendants' special charge or instruction No. 1 to the jury, which special charge of instruction was requested to be given to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which special charge is as follows:

"You are instructed to render in this cause a verdict in favor of the defendant, Houston Oil Company of Texas, for all the land sued for and claimed by the plaintiffs and the interveners in this cause, as the same is described in the petitions of said plaintiffs and said interveners, and also that the plaintiffs and interveners take nothing as against either of the defendants, Kirby Lumber Company or the Maryland Trust Company."

Because under the evidence herein or the law applicable thereto, it would be presumed that there were deeds of conveyance superior in all respects to the title asserted by plaintiffs and interveners out of the said Charles A. Felder, the original grantee of said league of land, to

(a) R. O. Lusk, under whom defendants claim by regular chain of title.

(b) William A. Daniels, under whom defendants claim by regular chain of conveyances.

(c) Joshua Smith, under whom defendants claim by regular chain of title.

Because the evidence in this case clearly shows that for more than sixty years defendants and those under whom they claim, had claimed the tract of land in controversy, paying taxes thereon, rendering same for taxes, cutting timber therefrom, taking sand therefrom, together with many other acts of ownership, and the evidence further clearly shows that neither plaintiffs nor interveners nor those under whom they claim, have during said time asserted any title to said property, or any part thereof, or paid any taxes thereon, or exercised any acts of ownership thereon, and under said state

of facts and under the law it will be presumed that superior title passed to some or all of the persons under whom defendants claim.

XLV.

The court erred to the prejudice of these defendants, in rendering judgment for plaintiffs and interveners herein and against defendants for the property involved in this suit and for damages thereto, because under the evidence herein and the law applicable thereto, it would be presumed that there were deeds of conveyance superior in all respects to the title asserted by plaintiffs and interveners out of the said Charles A. Felder to

(a) R. O. Lusk, under whom defendants claim by regular chain of title.

(b) William A. Daniels, under whom defendants claim by regular chain of conveyance.

(c) Joshua Smith, under whom defendants claim by regular chain of title.

Because the evidence in this case clearly shows that for more than sixty years defendants and those under whom they claim, had claimed the tract of land in controversy, paying taxes thereon, rendering same for taxes, cutting timber therefrom, taking sand therefrom, together with many other acts of ownership, and the evidence further clearly shows that neither plaintiffs nor interveners nor those under whom they claim, have during said time asserted any title to said property, or any part thereof, or paid any taxes thereon, or exercised any acts of ownership thereon, and under said state of facts and under the law it will be presumed that superior title passed to some or all of the persons under whom defendants claim.

XLVI.

The court erred to the prejudice of these defendants, in failing and refusing to give defendants' special instruction No. 1 which special instruction No. 1 was presented to the court and requested to be given to the jury while the jury was still at the bar, and before it retired to consider of its verdict, which special charge is as follows:

"You are instructed to render in this cause a verdict in favor of the defendant, Houston Oil Company of Texas, for all the land sued for and claimed by the plaintiffs and the interveners in this cause, as the same is described in the petitions of said plaintiffs and said interveners, and also that the plaintiffs and interveners take nothing as against either of the defendants, Kirby Lumber Company or the Maryland Trust Company."

Because it clearly appears that if Charles A. Felder did in fact make, execute and deliver to the said John A. Veatch deed, as claimed by plaintiffs and interveners, and under which said persons claim, that there was only conveyed by said deed to the said Veatch an equitable title to said land, and the burden of proof is upon the said Veatch and those claiming under him to show that he did not have notice of the prior deed from Charles A. Felder to William A. Daniels, and that he was the bona fide innocent purchaser for value, without notice of said deed to the said Daniels.

XLVII.

The court erred to the prejudice of these defendants, in rendering judgment for plaintiffs and interveners and against these defendants for the premises in controversy and for

damages thereto, for the reason that it clearly appears that if Charles A. Felder did in fact make, execute and deliver to the said John A. Veatch, as claimed by plaintiffs and interveners, and under which said persons claim, that there was only conveyed by said deed to the said Veatch an equitable title to said land, and the burden of proof is upon the said Veatch and those claiming under him to show that he did not have notice of the prior deed from Charles F. Felder to William A. Daniels, and that he was the bona fide innocent purchaser for value, without notice of said deed to the said Daniels.

XLVIII.

The court erred to the prejudice of these defendants, in assuming that the purported deed from Charles A. Felder to John A. Veatch, dated June 18, 1839, was in fact made, executed and delivered by the said Felder to the said Veatch, and in rendering judgment in favor of the plaintiffs and interveners for the premises in controversy and for damages thereto, against these defendants, because the uncontradicted evidence in this case shows that the said purported deed from Felder to Veatch on its face was not free from suspicion, in that the original letter written by said John A. Veatch, and the original deeds executed by said John A. Veatch, as well as the purported deed from Felder to Veatch, were all written in the same handwriting and by the said John A. Veatch, and in that the uncontradicted evidence in this case shows that the said John A. Veatch wrote the said deed from Felder to Veatch, that he signed the name of Charles A. Felder thereto, and that he, himself, wrote the names of the subscribing witnesses, W. B. Barnett and Samuel Palmer to said deed.

And the evidence further shows that neither of said subscribing witnesses, W. B. Barnett or Samuel Palmer, had ever been heard of as having lived in the vicinity of Jasper County, before, at, or since the date of the purported execution of said deed.

XLIX.

The court erred to the prejudice of these defendants in holding and finding that the plaintiffs and interveners had established title to the land in controversy unless defendants could show title under the Five Years' Statute of Limitation, and erred in so instructing the jury, and erred in so holding and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defendants for the land in controversy herein and for damages thereto, because it is clearly established by the evidence in this cause that James Morgan, the ancestor of interveners and under whose will interveners claim, heretofore, to-wit, on the 21st day of November, 1844, conveyed to William W. Swain the tract of land in controversy herein, and the interveners have, therefore, shown no title whatsoever to the property in controversy, and this is true, notwithstanding the agreement entered into between plaintiffs and interveners, because under said agreement the interveners, if not entitled to recover in their own right, could only recover under the plaintiffs, and as vendees of the plaintiffs, and only such portion of the land in controversy as plaintiffs may have shown themselves entitled to recover, and the court further erred in rendering judgment for the interveners herein for the same reasons.

L.

The court erred to the prejudice of these defendants, in holding and finding that the plaintiffs and interveners had

established title to the land in controversy unless defendants could show title under the Five Years' Statute of Limitation, and erred in so instructing the jury, and erred in so holding and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defendants for the land in controversy herein and for damages there-to, because the evidence clearly showed that there can be no title and is no title to the land in controversy in interveners, for the reason that interveners claim under and by virtue of the last will and testament of James Morgan, deceased, and as devisees of said Morgan, and the evidence in this case clearly shows that the Charles A. Felder league consists of 4428 acres of land, and that if the said James Morgan acquired title to said league, he only acquired title to said 4428 acres, and that the said James Morgan on, to-wit, the 21st day of November, 1844, conveyed to W. W. Swain 2578 acres of said league of land, being the property now in controversy herein, and that the said James Morgan, on the 17th day of October, 1845, conveyed to William D. Lee 1850 acres out of said Charles A. Felder survey, which passed by mesne conveyances to William Walker, and the said James Morgan on the 12th day of March, 1863, conveyed to Ellen Lee 925 acres out of said Charles A. Felder survey, and that the said James Morgan on the 7th day of October, 1865, conveyed to Ellen Lee 925 acres out of said Charles A. Felder survey, and it further appears from the evidence offered in this cause, which evidence was erroneously excluded by the court, that the Charles A. Felder survey is in conflict with the A. Lancaster survey to the extent of 290 acres, and that the said A. Lancaster survey constitutes a superior outstanding title, with which the interveners have not connected themselves,

and under which they do not claim, from all of which it clearly appears that the interveners have no title whatsoever to the tract of land in controversy, or at the most that the interveners are only entitled to judgment in the event the deed from James Morgan to W. W. Swain is not established, to the difference between the aggregate amount of the tracts conveyed by Morgan to W. D. Lee and by Morgan to Ellen Lee, which amount to 3700 acres, to which should be added the 290 acres, which are in conflict, making an aggregate amount of 3990 acres, making the highest amount that interveners would be entitled to judgment for, 438 acres, and this is true, notwithstanding the agreement entered into between the plaintiffs and interveners, because under said agreement, if the interveners are not entitled to recover in their own right, they can only recover under and through plaintiffs, and the vendees of plaintiffs.

LI.

The court erred to the prejudice of these defendants in holding and finding that the plaintiffs and interveners had established title to the land in controversy unless defendants could show title under the Five Years' Statute of Limitation, and erred in so instructing the jury, and erred in so holding and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defendants for the land in controversy herein and for damages there-to, because it clearly appears from the evidence

(a) That Charles A. Felder never acquired title to the 290 acres of the Felder league in controversy, which is in conflict with the A. Lancaster survey, as clearly appears from the legal evidence offered by defendants, and that said 290

acres did not at any time pass to the said John A. Veatch, or to the said James Morgan;

(b) That the said James Morgan on the 21st day of November, 1844, made, executed and delivered to W. W. Swain his deed for 2578 acres of land, being the land in controversy herein now;

(c) That the said James Morgan on the 17th day of October, 1845 made, executed and delivered to William D. Lee a deed for 1850 acres out of said Felder league;

(d) That the said James Morgan on the 12th day of March, 1863, made, executed and delivered to Ellen Lee a deed for 925 acres out of said Felder league;

(e) That the said James Morgan on the 7th of October, 1865, made, executed and delivered to the said Ellen Lee a deed for 925 acres out of said Felder league;

(f) That the interveners claim as devisees under the will of said Morgan, and it clearly appears from the facts above set forth that they have no title to any part of the land now in controversy, and this notwithstanding the agreement entered into between plaintiffs and interveners, because interveners, if not entitled to recover in their own right, can only recover under and as vendees of plaintiffs.

LII.

The Court erred to the prejudice of these defendants in holding and finding that the plaintiffs and interveners had established title to the land in controversy unless defendants could show title under the Five Years' Statute of Limitation, and erred in so instructing the jury, and erred in so holding and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defend-

ants for the land in controversy herein and for damages thereto, because the plaintiffs failed to make out their case herein, in that plaintiffs did not show that William M. Goodrich, under whom plaintiffs claim, ever acquired any title to the tract of land in controversy herein, in that

(a) Plaintiffs claim under an alleged deed from James Morgan to W. W. Swain, dated the 21st day of November, 1844, and purporting to convey the land in controversy in this suit, and the evidence in this case as between plaintiffs and defendants is wholly insufficient to establish the making and execution of said deed from the said Morgan to the said Swain;

(b) Plaintiffs claim under an alleged deed from William W. Swain to Robert Rose, dated the 5th day of January, 1846, and plaintiffs have failed to show by the evidence herein that said deed was in fact made, executed and delivered, and the Court erred in rendering judgment for the plaintiffs herein for any portion of the land involved in this suit, and particularly the court erred in rendering judgment for plaintiffs herein for more than 1721 acres, being the amount alleged to have been conveyed by the said Swain to the said Robert Rose, plaintiffs having only established title to said 1721 acres, if they have established title to any of the land in controversy in this suit.

LIII.

The Court erred in the prejudice of these defendants in holding and finding that the plaintiffs and interveners had established title to the land in controversy unless defendants could show title under the Five Years' Statute of Limitation, and erred in so instructing the jury, and erred in so holding

and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defendants for the land in controversy herein and for damages thereto, because it was not shown that plaintiffs connected themselves with the sovereignty of the soil by a chain of title legally admissible in evidence, and particularly because plaintiffs have not shown that William W. Swain conveyed the 1721 acres of land which plaintiffs claim to have been devised to them by their ancestor, William M. Goodrich, to Robert Rose, under whom said Goodrich claimed.

LIV.

The court erred to the prejudice of these defendants in holding and finding that the plaintiffs and interveners had established title to the land in controversy unless defendants could show title under the Five Years' Statute of Limitation, and erred in so instructing the jury, and erred in so holding and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defendants for the land in controversy herein for damages thereto, because under all of the evidence and the law applicable thereto, plaintiffs and interveners, if entitled to recover anything, were only entitled to recover 1721 acres of land, in that all of the title to the 2578 acres of land passed out of James Morgan, under whom interveners claim, as devisees, prior to the death of said Morgan, and it clearly appears from the evidence herein that if any title passed to W. M. Goodrich under whom plaintiffs claim as devisees, only 1721 acres passed to him, the said W. M. Goodrich.

LV.

The court erred to the prejudice of these defendants in holding and finding that the plaintiffs and interveners had established title to the land in controversy unless defendants could show title under the Five Years' Statute of Limitation, and erred in so instructing the jury, and erred in so holding and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defendants for the land in controversy herein and for damages thereto, and erred in withdrawing from the jury the issue of whether or not there was a deed executed by James Morgan to W. W. Swain dated November 21, 1844, and erred in assuming, in effect, in its charge to the jury, that said deed had not been established and proven, and erred in rendering judgment for plaintiffs and interveners herein for the 2578 acres of land in controversy, or for any part thereof, because the question of whether or not the said deed from the said James Morgan to W. W. Swain had in fact been executed and delivered, was a question of fact for the jury, and the defendants were entitled to have said question submitted to the jury, and were entitled to have the jury pass upon said question.

LVI.

The court erred in rendering judgment in favor of the plaintiffs herein, because under the evidence in this case, and the law applicable thereto, it clearly appears that James Morgan only acquired title, if any, to 4188 acres of land out of the Charles A. Felder league, to-wit, that portion of the Felder league not in conflict with the A. Lancaster survey, and that the said James Morgan, prior to his death, conveyed to other persons, with whom plaintiffs do not in any way

whatsoever connect, and from whom plaintiffs do not and have not acquired title, and whose title plaintiffs have in no way acquired, 6278 acres of land to be taken out of said Charles A. Felder league, or more land than said James Morgan owned on said survey.

LVII.

The court erred to the prejudice of defendants in refusing to admit in evidence and in refusing to consider in evidence the certified copy of field notes and the certified copy of patent of title of the A. Lancaster survey in Hardin County, shown to be in conflict with the Charles A. Felder league, and to be older and prior in location to the Felder league, and to be a superior outstanding title to 290 acres of the Felder league with which neither plaintiffs nor interveners connect, and the court further erred in rendering judgment for plaintiffs and interveners for the portion of the Charles A. Felder league shown by the evidence to be in conflict with the said A. Lancaster survey.

LVIII.

The court erred to the prejudice of defendants in permitting the interveners to offer in evidence over the objections of defendants, the certified copy of the plaintiff's petition in the cause of Walker et al v. Beaumont Shingle & Lumber Company, because the same was wholly irrelevant and immaterial to any issue in the cause, and these defendants were not in any way bound thereby, or estopped thereby, and could not be legally bound or estopped by reason of the filing of said petition, nor what was contained therein, and because said petition would not have the legal effect of declaring the portion of the Charles A. Felder league to which the deed from James Morgan

to W. D. Lee could be applied, all of which objections are set forth and will be set forth in the Bills of Exceptions saved by defendants in this cause.

LIX.

The court erred to the prejudice of these defendants in refusing to give to the jury Special Instruction No 18, requested by defendants, which Instruction was presented to the court and requested to be given while the jury was still at the bar, and before it retired to consider of its verdict, which Special Instruction is as follows:

"You are instructed that it is claimed by the defendants in this cause as against the interveners only that James Morgan on the 21st day of November, 1844, executed and delivered to one William W. Swain, a deed conveying to the said Swain 2578 acres of land out of the said Charles A. Felder league, being the same land that is in controversy herein. You are instructed that neither the deed nor a certified copy from the said Morgan to the said Swain so claimed to have been executed and delivered has been introduced in evidence before you, and it is therefore a question of fact for you to determine whether such deed from the said Morgan to the said Swain was in fact made and delivered; and in this connection you are instructed that the execution and delivery of a deed may be shown by circumstances, if in the opinion of the jury such circumstances bearing on that issue are sufficiently strong to show such fact and the jury is at liberty to determine whether they will indulge the presumption that a deed was in fact executed and delivered by the said James Morgan to the said William

W. Swain, conveying said land to the said Swain. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury; and in this connection you are instructed that if you shall believe, upon a consideration of all the facts and circumstances in the case before you (those which the jury may believe to repel, as well as those which the jury may believe to favor such presumption), that the circumstances are consistent with the inference or presumption that such a deed was made by the said Morgan to the said Swain as claimed, and that in view of all the circumstances it is more reasonably probable that such deed was made than that it was not, then the jury is at liberty to presume and find that such deed, as claimed, was in fact made and delivered by the said Morgan to the said Swain; and if the jury, deciding the issues in favor of the weight of the evidence on this point, to be determined by them, do so presume and find, then you are instructed that the interveners herein can recover nothing in this suit, and in such event you will find that the interveners take nothing herein, and this will be so without regard to the other issues submitted herein, and also without regard to what your verdict shall be as between the plaintiffs and the defendants herein."

* And the court erred in rendering a judgment in favor of interveners for 2578 acres of the land in controversy herein, because the evidence clearly raised an issue of fact upon which the defendants herein were entitled to have the jury pass, and which the court should have submitted to the jury, as to whether

or not the said deed from the said Morgan to the said Swain was in fact made, executed and delivered, and the court erred in assuming, in effect, in its charge to the jury, that said deed had been so made, executed and delivered, and this is true, notwithstanding the agreement entered into between the plaintiffs and interveners, because under said agreement between the plaintiffs and interveners, the interveners, if not entitled to recover in their own right, could only recover under and through and as vendees of the plaintiffs, and the evidence in this case clearly shows that the plaintiffs themselves in their own right are not entitled to recover, or if entitled to recover, are not entitled to recover more than 1721 acres of land.

LX.

The court erred to the prejudice of the defendants in admitting in evidence a certified copy of an alleged deed from William W. Swain to Robert Rose, dated January 5, 1846, for the reason that it clearly appears, that neither said deed nor a certified copy thereof has ever been recorded in Hardin County, Texas, where the property in question is situated, and certified copy offered in evidence by the plaintiffs is from the records of Tyler County and purports to show that said deed was filed for record in Tyler County on the 5th day of October, 1858, after the creation of Hardin County, and at a time when the property was situated in Hardin County, and not in Tyler County, and because under the law certified copy from Tyler County of said deed is a nullity, of no force and effect, proves nothing and is wholly inadmissible in evidence as a muniment of title, and defendants refer to their objections and exceptions made upon the trial of this cause as to said instruments. And the court fur-

ther erred in rendering judgment for plaintiffs for the land in controversy, based upon said instrument or said certified copy, and erred in assuming in its charge to the jury that it was proven that the said William W. Swain made a deed to the said Robert Rose as claimed by the plaintiffs.

LXI.

The court erred to the prejudice of these defendants in rendering judgment for plaintiffs and interveners for the land in controversy in this suit, and for damages thereto, against these defendants, because the evidence in this case showed that the Texas Pine Land Association, under whom the Houston Oil Company of Texas claims, had and held, through its agent, G. B. & K. C. Railroad, peaceable, adverse and continuous possession of the tract of land in controversy, for more than three years, and for more than five years, holding under deeds duly registered, and paying all taxes thereon, and under the uncontroverted evidence in the case, said G. B. & K. C. Railroad was holding the entire Charles A. Felder league, and was entitled to use and enjoy the entire Charles A. Felder league of land.

LXII.

Because the court erred to the prejudice of defendants in permitting the witnesses, T. E. Danziger, N. B. Scott, W. H. Knipple, Wiley Brackin, Joe Bumpstead, Wm. Carroll and Tom Pattillo, over the objections of defendants, to testify as to the size and extent of what the witnesses termed "sand pit 'F'," the "sand pit" or "sand hill," at the station of Fletcher on the Gulf, Colorado & Santa Fe Railway on the Charles A. Felder league of land in Hardin County, because such testimony was not competent to vary or change the plain

import of the contracts introduced in evidence between the Houston Oil Company of Texas and the Texas Builders' Supply Company, said contracts being entire, complete and wholly unambiguous; because said contracts were plain and unambiguous, showing the clear express intention of the parties thereto that the Texas Builders' Supply Company should, and by virtue of said contracts did, have the right and license to enter in and upon the land for the purpose of taking sand from wherever on said land same might be found, and the contracts did not limit the Texas Builders' Supply Company to any defined part or portion of said land; because the testimony of said witnesses was merely their views, and opinions as to what *sand pit F* was, and not what the contracting parties meant, and understood sand pit F to be; because said contracts did not by metes and bounds, or by other description, limit or restrict the operations thereunder to any specific or defined part of the land in controversy. And the court erred to the prejudice of these defendants in rendering judgment for plaintiffs and interveners against defendants for the land sued for and damages thereto, upon the verdict returned by the jury based upon such evidence so admitted as aforesaid.

LXIII.

The court erred to the prejudice of these defendants in holding and finding that the plaintiffs and interveners had established title to the land in controversy unless defendants could show title under the five years' statute of limitation, and erred in so instructing the jury, and erred in so holding and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defendants for the land in controversy herein and for damages

thereto, because the court assumed that the purported deed from Charles A. Felder to John A. Veatch was recorded in Liberty County, Texas, before the deed to Daniels and Smith because the affidavit of forgery denied the recording of same, placing the burden of proving same on plaintiffs and interveners, and no proof appeared or corroborating circumstances were shown to establish the record of said deed, the long non-claim by them being strongly presumptive that same was not recorded.

LXIV.

The court erred to the prejudice of these defendants in holding and finding that the plaintiffs and interveners had established title to the land in controversy unless defendants could show title under the five years' statute of limitation, and erred in so instructing the jury, and erred in so holding and finding, and upon such holding and finding rendering judgment for plaintiffs and interveners against these defendants for the lands in controversy herein, and for damages thereto, for the reasons that the evidence showed that the defendants, and their predecessors in title had been in uncontroverted, adverse and peaceable possession of said premises for more than three years before the institution of this suit, claiming under title and color of title from and under the sovereignty of the soil, in that defendants held under a deed from Charles A. Felder, the original grantee to William A. Daniels, dated June 10, 1839, because the deed from Charles A. Felder to William A. Daniels antedated the purported deed from Charles A. Felder to John A. Veatch, under whom plaintiffs and interveners claim title; because if Felder executed two deeds, the first (that to William A. Daniels) passed the title to the land, under which deed de-

941

defendants held, and was title and color of title as against the junior claim under the purported deed from Felder to Veatch, regardless of the registration of either; because the title to the land vested in William A. Daniels, and the presumption is that the deed to him was duly registered in Liberty County, and the evidence being that the records of said county were destroyed in 1874, the necessity of evidence of due registration prior to the date of the purported execution of the deed from Felder to Veatch was not essential to support title under and by virtue of the three years' statute of limitation; because the active and long assertion of claim and use of said land by defendants, as opposed to the long non-assertion of claim and non-use of same by plaintiffs and interveners, even though the deed from Felder to Daniels was not recorded until after the execution of the deed to Veatch (if any), was sufficient to raise the presumption (and the jury could have found) that said Veatch at the date he took said deed, if any, had notice of the then existing deed from Felder to Daniels; because the record of the purported Veatch deed having been destroyed in 1874, the record of the deed to Daniels in the Menard County records was sufficient title and color of title to support the three years' statute of limitation.

LXV.

The court erred to the prejudice of these defendants in admitting in evidence, over the objections of defendants, as evidence of title, to which defendants in open court excepted as shown by bill of exceptions herein, the recitals of alleged prior deeds of conveyance and the following deeds offered by plaintiffs and interveners, and in rendering judgment in favor

of the plaintiffs and interveners against defendants based upon such testimony, which deeds are as follows, to-wit:

- (a) John A. Veatch to James Morgan.
- (b) James Morgan to W. W. Swain.
- (c) W. W. Swain to Robert Rose.
- (c) John N. Rose to Wm. M. Goodrich.

LXVI.

The court erred to the prejudice of these defendants, in permitting the witness J. R. Bevil to testify to the handwriting of John Bevil to the certificate of acknowledgement to the alleged deed from Felder to Veatch, over defendants' objections as shown by bill of exceptions herein, and in rendering judgment in favor of the plaintiffs and interveners against defendants for the property in controversy and for damages thereto, based upon such evidence, all of which is fully shown by bill of exceptions herein.

LXVII.

The court erred to the prejudice of these defendants in admitting in evidence over the defendants' objections, and to which defendants excepted, the various documents produced from the custody of the witness A. L. Mays as a standard of comparison of the alleged handwriting of John Bevil to the certificate of acknowledgement to the purported deed from Charles A. Felder to John A. Veatch, for the reasons fully shown by the bill of exceptions herein, to which reference is made.

LXVIII.

The court erred to the prejudice of these defendants in admitting in evidence, over the objection of these defendants,

and in rendering judgment for plaintiffs and interveners thereon, against these defendants, to which defendants in open court excepted, the testimony of Henry Ralph, T. B. Beaty, Mrs. Nellie Lowe, David Rafferty, C. H. Rafferty, Joseph D. Adams, O. B. Johnson, Mrs. Annie E. Snow, Tom C. Davis, as to the general reputation of John A. Veatch, as shown by Bill of Exceptions herein, because said testimony was wholly irrelevant and immaterial and for the reasons set forth in said Bill of Exceptions.

LXIX.

The court erred to the prejudice of these defendants in admitting in evidence as a muniment of title, over the objections of these defendants, to which defendants in open court excepted, and erred in rendering judgment for plaintiffs and interveners based on same, a certified copy of deed from John N. Rose to William M. Goodrich, dated January 12, 1871, for the following reasons as shown by Bill of Exceptions herein, to-wit:

(a) Because the certified copy offered is from the deed records of a county other than where the land is situated, and purporting to have been executed in said county and filed when none of the land in controversy was situated in said county, and no land described in said deed is situated in said County, and neither the original deed nor said certified copy is shown to have been recorded in Hardin County, where the land lies, and there is no law which would authorize the admission in evidence of such certified copy.

(b) Because the deed purports to have been acknowledged before James Garland, Judge of the Corporation Court of Lynchburg, Virginia, January 12, 1871, and such officer

was not authorized nor permitted by law to take and certify such acknowledgment under the law then and since in force, and such purported action is void and of no effect.

(c) Because it is not shown that said purported deed has been of record in Hardin County, the county where the land is situated, for ten years, in that it is shown that the record thereof was destroyed and said deed was not again recorded, as required by law.

(d) Because the record of said deed in a county other than where the land is situated for ten years was not sufficient to cure the invalidity of said acknowledgment.

(e) Because even if it be conceded, which it is not, that said deed was recorded in the county where the land lies for ten years, or that same was recorded in a county other than where the land lies, for ten years, there is no law which validates certificates of acknowledgment or deeds with defective certificates, where such defects were due to want of authority in the officer taking same.

(f) Because it is now shown that there has been no adverse claim or inconsistent claim to the one evidenced by said instrument, but on the contrary it affirmatively appears from the pleadings and evidence herein that the interveners herein are claiming, and have been for many years, adversely and inconsistently to plaintiffs, who claim under said deed.

(g) Because said deed is void for want of description, and does not describe any land and particularly the land in controversy in this suit.

LXX.

The court erred to the prejudice of these defendants in admitting in evidence, over defendants' objections, certified copy of purported deed from William W. Swain to Robert Rose, dated January 5, 1846, to which defendants in open court excepted, as shown by Bill of Exceptions herein, and erred in rendering judgment for plaintiffs and interveners based on same, for the following reasons, to-wit:

(a) Because the certified copy offered is from the deed records of a county other than where the land is situated, and purporting to have been executed in said county and filed when none of the land in controversy was situated in said county, and no land described in said deed is situated in said county, and neither the original deed nor said certified copy is shown to have been recorded in Hardin County, where the land lies, and there is no law which would authorize the admission in evidence of such certified copy.

(b) Because the said purported deed does not appear to have been acknowledged as required by law, and is not entitled to go to record, and the record thereof is void and of no effect.

(c) Because the record of said deed in a county other than where the land is situated for ten years was not sufficient to cure the invalidity of said acknowledgment.

(d) Because even if it be conceded, which it is not, that said deed was recorded in the county where the land lies for ten years, or that same was recorded in a county other than where the land lies, for ten years, there is no law which validates certificates of acknowledgment or deeds with defective certificates, here such defects were due to want of authority in the officer taking same.

(e) Because it is not shown that there has been no adverse claim or inconsistent claim to the one evidenced by said instrument, but on the contrary if affirmatively appears from the pleadings and evidence herein that the interveners herein are claiming, and have been for many years, adversely and inconsistently to plaintiffs, who claim under said deed.

LXXI.

The court erred to the prejudice of these defendants in admitting in evidence as a muniment of title, over the objection of defendants, certified copy of purported deed from Robert Rose to John N. Rose, dated August 4, 1854, to which defendants in open court excepted, as shown by Bill of Exceptions herein, and erred in rendering judgment for the plaintiffs and interveners based on said instrument, for the following reasons, to-wit:

(a) Because the certified copy offered is from the deed records of a county other than where the land is situated, and purporting to have been executed in said county and filed when none of the land in controversy was situated in said county, and no land described in said deed is situated in said county, and neither the original deed nor said certified copy is shown to have been recorded in Hardin County, where the land lies, and there is no law which would authorize the admission in evidence of such a certified copy.

(b) Because the record of said deed in a county other than where the land is situated for ten years was not sufficient to cure the invalidity of said acknowledgment.

LXXII.

The court erred to the prejudice of these defendants in admitting in evidence, over defendants' objections, and per-

mitting the jury to consider, and in rendering judgment in favor of plaintiffs and interveners upon the verdict that the jury rendered on consideration of, two certain letters, written by A. W. Standing, General Manager of the Houston Oil Company of Texas, to H. G. Brown Supply Company which letters are in substance as follows:

"Houston, Texas June 7th 1911.

File P-1.

Abstract No. 21 Chas. A. Felder Survey Hardin County.

Messrs. H. G. Brown Supply Co.
Beaumont Tex.

Gentlemen:

Replying to your favor of the 3rd Inst.: I notice from the sketch you sent in that you want to locate the sand pit West of the Santa Fe Railroad and in close proximity to another sand pit located there. We were under the impression that you desired to take sand from off our tract and East of the Railroad and we have a large quantity of sand on that side of the road and we would be willing to enter into a contract with you; we, however, would not be willing to furnish sand to the Santa Fe for nothing—in other words, we would expect them to pay a reasonable amount per car, similar to what other people are paying us, for same.

Please advise further relative to this proposition.

Yours very truly,

AWS-GC.

A. W. Standing,
General Manager."

Houston, Texas, July 7, 1911

File—P-1.

Abst. 21, Charles A. Felder Survey. Hardin County.

H. G. Brown Supply Co.,
Beaumont, Texas.

Gentlemen:

Referring to the correspondence we have had in relation to the proposed sand pit which was wanted by you, location to be on the above league, we have decided that at the present time it would not be advisable to lease same for that purpose.

Yours very truly,

A. W. Standing,
General Manager."

AWS-JEC

To which letters defendants in open court excepted, and which objection and exceptions are shown by Bill of Exceptions herein, because

(a) It is shown that said letters were written since the time of the filing of this suit, and the status of the parties could not be affected by the letters or any declaration contained in them.

(b) Said letters were wholly irrelevant and immaterial to any issue in the case.

(c) Said letters, if offered for the purpose of varying the written contract existing between the Houston Oil Company of Texas and the Texas Builders Supply Company, are wholly inadmissible, because said contract is certain and unambiguous and can not be varied or changed by subsequent matters.

(d) Said letters were confusing and misleading to the

jury, and led the jury to believe that the possession and occupancy of the Texas Builders Supply Company was restricted to eight or nine acres of land and did not extend throughout the Charles A. Felder League.

(e) Said letters did not show, nor purport to show, that the Houston Oil Company of Texas was excluded by the Texas Builders Supply Company from the eight or nine acres constituting the excavation where said Texas Builders Supply Company was actually taking sand, and did not show, nor purport to show, that said Texas Builders Supply Company was not authorized to take sand from any part or portion of said Charles A. Felder league, and said letters were highly prejudicial to the rights of these defendants before the jury.

LXXIII.

The court erred to the prejudice of these defendants in admitting in evidence, over the objections of these defendants, to which defendants in open court excepted, and erred in rendering a judgment upon the verdict of the jury returned with such evidence before it, the testimony of the witnesses T. E. Danziger, E. K. Ward, Tom Patillo, N. B. Scott, W. H. Knipple, Wiley Brackin, Joe Bumpstead, and others, to the number of acres in and the extent of sand pit F, because the contracts with reference to said pit was not ambiguous, and oral testimony was not admissible to explain or vary same, and further said witnesses only gave or purported to give their views as to the extent of said sand pit without professing or claiming to know what was in the minds of the parties to said contracts, and further said testimony was wholly immaterial and irrelevant to any issue in the case, and highly prejudicial to the rights of defendants before the jury.

LXXIV.

The court erred to the prejudice of defendants in excluding the testimony of W. A. McClelland to the effect that T. E. Danziger, Secretary of the Texas Builders' Supply Company, stated to him that said Builders' Supply Company was entitled to take sand from any part of the Charles A. Felder league, because said testimony tended to show the manner in which said supply company was holding said Felder league, and the extent of such holding, which error was highly prejudicial to defendants before the jury.

LXXV.

The court erred to the prejudice of these defendants in rendering judgment for plaintiffs and interveners against defendants for the property involved in this suit and for damages thereto, because

(a) The evidence showed that the Texas Pine Land Association, and the Houston Oil Company of Texas together, and each separately, had had and held peaceable; adverse and continuous possession of the tract of land in controversy for the length of time and under the circumstances necessary to mature title under the three years five and ten years statute of limitation, which evidence was so conclusive as to require such instruction.

(b) The undisputed evidence shows that the possession and right to possession of said tract of land by the G. B. & K. C. Railroad was unrestricted by metes and bounds or otherwise, but included the whole of the Charles A. Felder league, or the tract in controversy, and continued uninterrupted for more than three years, more than five years, and more than ten years before the filing of this suit, and was accompanied by other elements and circumstances required by law.

(c) That the undisputed evidence by the records show that under the contracts between the Houston Oil Company of Texas and the Texas Builders' Supply Company, said supply company entered upon said tract of land on October 1, 1902, and took sand therefrom, lived thereon, each and every month until the filing of this suit, and that the employees of said supply company continuously resided thereon, during all of which time the Houston Oil Company of Texas claimed said league of land, under deeds duly registered, and paid all taxes thereon, and the possession and occupancy of said Builders' Supply Company was of the entire league, and not in any manner restricted by metes and bounds, or otherwise.

(d) The evidence admitted by the court over defendants' objections as to the extent of sand pit F and the letters of A. W. Standing, General Manager of the Houston Oil Company of Texas, likewise admitted, even if properly admitted, are not sufficient to show that said supply company was restricted to a small part of said league, so as to prevent it being held that such possession extended by construction to all parts of said league, and under the law as applied to the facts, such possession did extend to and include the entire league.

LXXVI.

The court erred to the prejudice of defendants in entering judgment herein on the verdict of the jury, as rendered, for the reason that said verdict is contrary to the law and the evidence, and wholly unsupported by any evidence, in that the great weight of the evidence clearly showed that the Houston Oil Company of Texas from October, 1902, down to the filing of this suit, was in continuous possession of the property in controversy, claiming the same under deeds duly registered,

and paying all taxes thereon, such possession being by, through and under the Texas Builders' Supply Company, which the uncontroverted evidence shows have removed sand from said tract of land each and every month from October, 1902, down to the filing of this suit, and there being no evidence to show that the possession of said Builders' Supply Company was in any manner restricted or confined to the portion of said Charles A. Felder league actually held by said Builders' Supply Company, and it being further clear that even if the evidence was sufficient to show that said Builders' Supply Company only held a restricted portion of said league, that said Builders' Supply Company were agents and contractors of and under the said Houston Oil Company of Texas, and the holding, occupancy and possession of said Builders' Supply Company would be the holding, occupancy and possession of the Houston Oil Company of Texas.

LXXVII.

The court erred to the prejudice of defendants in entering judgment on the verdict of the jury therein, because said verdict is wholly unsupported by the evidence and is in conflict with the evidence, in that it clearly appears from the evidence that The Texas Pine Land Association and the Houston Oil Company of Texas, both and each, from the fall of 1893 until October, 1902, held continuous possession of the tract of land in controversy herein, claiming same under deeds duly registered, paying all taxes thereon, which possession was by and through the G. B. & K. C. Railroad, which was the agent of said Texas Pine Land Association, and of the said Houston Oil Company of Texas, and it clearly appearing from the evidence that said G. B. & K. C. Railroad con-

tinuously during said time took sand from the said league of land, and that said railroad was entitled under the contract between it and the Texas Pine Land Association and Houston Oil Company of Texas, to take sand from any portion of said league, and was not restricted in its occupancy and use thereof, and it appearing from the evidence in the case that the Houston Oil Company of Texas and the Texas Pine Land Association were, during said period, otherwise in possession of said tract of land.

LXXVIII.

The court erred to the prejudice of defendants in submitting the question of what was intended to be included and embraced in the contract between the Houston Oil Company of Texas and the Texas Builders' Supply Company, because such contract or contracts were unambiguous and not uncertain, but were clear and explicit, and it was the duty of the court to construe said contracts, and there were no questions to be passed upon by the jury.

LXXIX.

The court erred to the prejudice of defendants in entering judgment upon the verdict of the jury herein, because said verdict is contrary to the law and the evidence and wholly unsupported by the evidence in that it is clearly shown that the possession of the Texas Builders' Supply Company of a portion of the Charles A. Felder league was in no manner whatsoever restricted, but that same included the entire Charles A. Felder league, and particularly the portion thereof involved in this suit, and because the evidence shows that said possession was continuous for more than five years and that said holding was that of the Houston Oil Company of Texas, who was

claiming said land, under deeds duly registered and the payment of taxes.

LXXX.

The court erred to the prejudice of these defendants in rendering judgment in favor of the plaintiffs and interveners against these defendants, for the property in controversy and for damages thereto, because the Houston Oil Company of Texas and those under whom it claims, as shown by the evidence herein, had and held peaceable and adverse possession of all or a portion of the Charles A. Felder League in Hardin County, Texas, for the length of time required by the Statute of Limitation of ten years, and the title of the Houston Oil Company of Texas and its vendors has been matured and ripened by the said Statute of Limitation of ten years, and same was a complete bar against the recovery by plaintiffs and interveners.

LXXXI.

The court erred to the prejudice of these defendants in refusing to give to the jury defendants Requested Instruction No. 23, which was presented to the court and requested to be given to the jury before the jury had retired to consider of its verdict, and while the jury was still at the bar, which Requested Instruction is as follows:

"You are instructed that, under the contract or contracts, if any, between the Texas Pine Land Association and the Gulf, Beaumont and Kansas City Railroad Company as shown by the evidence before you, an entry under said contract or contracts, if any, upon said land in controversy herein and use thereof, if any, by said Gulf, Beaumont and Kansas City Railroad Company

was, in law, an entry upon and use of said land by said Texas Pine Land Association;

And you are further instructed that if you believe, from the evidence before you, that the Gulf, Beaumont, and Kansas City Railroad Company, under said contract or contracts, if any, did enter upon the land in controversy herein, and did remove sand therefrom, or did otherwise use or enjoy same, such acts, if any, in removing sand or otherwise using or enjoying said land, would, if continued for the proper length of time, under a claim of right and ownership, as elsewhere explained to you in this charge, be sufficient to constitute title in favor of defendant Houston Oil Company of Texas; and you should find for the defendants."

Because the uncontroverted evidence in this case clearly showed that the said Gulf, Beaumont and Kansas City Railroad Company was entitled under said contract to take sand from any part or portion of the Charles A. Felder league, and the evidence showed that it went into possession of said Felder league in the fall of 1893 and continued such possession up to October, 1902, during which time vast quantities of sand were taken therefrom, and during all of which time the Houston Oil Company of Texas and its vendors, the Texas Pine Land Association was claiming said tract of land under deed or deeds duly registered and payment of taxes thereon, and the court erred in charging the jury contrary to said requested instruction, and further erred in submitting the question of the extent of said possession and holding by the said G. B. & K. C. Railroad to the jury, because the uncontroverted evidence showed that the contract was, as above stated, and there was no

issue of fact for the jury, that it was the duty of the court to construe said contract and charge the jury as to the legal effect thereof.

LXXXII.

The court erred to the prejudice of these defendants in excluding from the jury and refusing to admit in evidence certified copy of the deed from Charles A. Felder to William A. Daniels, dated June 10, 1839, under which deed defendants deraign title, same being excluded for the reasons set forth and shown by the Bill of Exceptions herein, to which action of the court defendants in open court excepted, because said certified copy came from the records of and from the proper county, and, under the laws of the State of Texas such certified copy was admissible in evidence as a muniment of title; and the court erred in assuming in its charge to the jury that a deed from the said Charles A. Felder to the said William A. Daniels had not been proven, and erred in rendering judgment in favor of plaintiffs and interveners against defendants on the theory that such deed had not been proven.

LXXXIII.

The court erred to the prejudice of these defendants in excluding from the jury certified copy of deed from Charles F. Felder to Joshua Smith, dated May 21, 1840, and refusing to admit said deed in evidence, same being excluded for the reasons set forth and shown by the Bill of Exceptions herein, to which action of the court defendants in open court excepted, because said certified copy came from the records of the proper county, and, under the laws of the State of Texas, was admissible as a muniment of title, and the court erred in assuming in its charge to the jury that a deed from the said

Charles F. Felder to the said Joshua Smith had not been proven, and erred in rendering judgment in favor of plaintiffs and interveners, on the theory that no such deed had been, in fact, executed.

LXXXIV.

Defendants now here adopt each paragraph of their Motion for New Trial as an assignment of error, as fully as if copied herein.

LXXXV.

The court erred in admitting in evidence a certificate from the Secretary of State of the State of Texas, to the effect and purporting to show that William Myers was not a notary public at the date of the execution of the deed from the said Charles A. Felder to the said William A. Daniels, acknowledged before the said William Myers, as a notary public of Jasper County, because:

(a) Said certificate was a purported compilation of what is shown by the records of the office of the Secretary of State, and was not and did not purport to be a certified copy of what there appeared.

(b) Said purported certificate was wholly immaterial and irrelevant to any issue in the case, and wholly inadmissible for the purpose of showing that said William Myers was not such notary public, and it was hearsay and secondary evidence.

(c) If said certificate was admissible on the issue of whether said William Myers was a notary public at the date of the said deed from Felder to Daniels, it was only admissible as a circumstance on said issue upon which the jury, and not the court, must pass, and the court erred in not submitting the

question of whether the deed was in fact executed to the jury, and in not submitting the question of whether or not the said William Myers was in fact a notary public to the jury.

LXXXVI.

Defendants complain of the many plain and apparent errors appearing upon the record in this cause not necessary to be assigned, but which will be set forth and pointed out in the briefs and arguments.

That each and all of the errors of the court hereinbefore pointed out and set forth were material errors and prejudicial to these defendants, and but for said errors defendants would have recovered judgment herein, and that the same were errors on the substantial law of the case and were highly prejudicial to these defendants and tended to and did deprive these defendants of their just and legal rights herein, and were of such a nature as to entitle these defendants to a new trial when presented to the court.

Wherefore, said defendants pray that the judgment aforesaid be reversed, annulled and altogether held for naught, and the cause remanded for a new trial, and for all such other relief as they may be entitled to, and for their costs.

H. O. HEAD,
PARKER & KENNERLY,
Attorneys for the Houston Oil
Company of Texas, Kirby Lum-
ber Company, and Maryland
Trust Company.

ORDER ALLOWING WRIT OF ERROR

Entered in U. S. District Court on Feb. 3, 1915.

On this 3rd day of February A. D. 1915, came the defendants, Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company, and presented to the court their petition praying for the allowance of a Writ of Error and Supersedeas herein, and it appearing that the Assignments of Error, intended to be urged by them, have been duly filed in the office of the Clerk of the District Court of the United States for the Eastern District of Texas at Beaumont,—

The above and foregoing Writ of Error and Petition for Supersedeas being considered, it is ordered, adjudged and decreed that said Writ of Error be allowed as prayed for, and that upon the defendants, Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company, executing and filing a supersedeas bond, conditioned and payable as required by law, in the sum of five thousand dollars, said bond to be approved by this court or a Judge thereof, any and all proceedings for the enforcement of said judgment and orders be stayed and suspended until said cause is heard and determined by the Appellate Court.

GORDON RUSSELL,
United States District Judge for
the Eastern District of Texas.

SUPERSEDEAS BOND.

Filed in U. S. District Court on Feb. 3, 1915.

KNOW ALL MEN BY THESE PRESENTS, That we, the Houston Oil Company of Texas, the Kirby Lumber Company, and the Maryland Trust Company, as principals,

and Maryland Casualty Co. as surety, are held and firmly bound unto Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, the heirs of William Goodrich, deceased, and the Texas Builders Supply Company, and Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband, Louis L. Cox, in the full and just sum of Five Thousand Dollars, to be paid to the said Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, the heirs of William Goodrich, deceased, and the Texas Builders Supply Company, and Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband, Louis L. Cox, their heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, successors or assigns, jointly and severally, by these presents.

The conditions of the above obligations are such that whereas at a session of the United States Court in and for the Eastern District of Texas, held at the City of Beaumont, final judgment was rendered, on December 1, 1914, in the above styled and numbered cause in said Court, in favor of the said Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, the heirs of William Goodrich, deceased, and Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband, Louis L.

Cox, against the Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company, for a certain tract or parcel of land involved in said suit, and in favor of Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, the heirs of William Goodrich, deceased, and Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband, Louis L. Cox, against the Houston Oil Company of Texas and the Texas Builders Supply Company, for the sum of Twelve Hundred and Eighty-six Dollars as damages, with interest thereon, which said judgment is in words and figures substantially as follows:

In the District Court of the United States for the Eastern District of Texas, at Beaumont.

Cornelia G. Goodrich, et al.

vs.

D. L. 408.

Houston Oil Company of Texas, et al.

JUDGMENT.

Entered Dec. 1st, 1914.

On the 20th day of November, 1914, at a regular term of this Court, the above numbered and entitled cause was called for trial. Thereupon, the plaintiffs and interveners say they will not longer prosecute their suit against the defendant J. H. Cook and said defendant Cook declines further to prosecute his cross-action for the recovery sought by him in his answer herein.

It is therefore ordered and adjudged by the court that the cause of action of both the plaintiffs and the interveners

against the defendant Cook, as well as the cross-action of said defendant, be dismissed without prejudice to either party, and that the said defendant Cook recover of plaintiffs and the interveners his costs in this behalf expended.

And thereupon defendants Houston Oil Company of Texas, Maryland Trust Company and Kirby Lumber Company announced to the court that they and each of them would no longer prosecute that part of their cross-action herein which seeks to recover damages for timber cut and for sand removed, or other damages or rents against the plaintiffs or the interveners, or any other party to this suit; and it is ordered that same be, and is hereby dismissed without prejudice.

And thereupon all parties to said suit, plaintiffs, interveners and defendants, announced ready for trial, and then came a jury of good and lawful men, to-wit: J. W. Goldsberry, foreman, and eleven others, who were duly selected, empaneled and sworn as the law directs, and the said trial was continued from day to day up to and including the 1st day of December, 1914, when after hearing the evidence, argument of counsel and charge of the court, the jury returned into open court the following verdict:

"We, the jury, find for the plaintiffs and interveners and against the defendants for the land in controversy, and for damages in the sum of \$1286.00.

J. W. GOLDSBERRY, Foreman."

Beaumont, Texas, Dec. 1st, 1914.

And it having been made to appear to the court that the plaintiffs and the interveners had compromised their differences, and had agreed that any recovery had by the one or

the other or by both, should inure in equal portions to the heirs of William M. Goodrich, deceased, plaintiffs, on the one part, and the heirs or devisees of James Morgan, deceased, on the other part:

It is therefore ordered, adjudged and decreed by the court that plaintiffs, Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery, and his wife, Mary W. Montgomery, Helen M. Krasica and her husband Jean Krasica, the heirs of William M. Goodrich, deceased, and the interveners, Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband, Louis L. Cox, for those claiming under James Morgan, deceased, do have and recover of and from the Houston Oil Company of Texas, a corporation, the Kirby Lumber Company, a corporation, the Maryland Trust Company, a corporation, and the Texas Builders Supply Company, a corporation, the following described tract of land, to-wit: A part of the league granted by the Mexican Government to Charles A. Felder, situated in Hardin County, Texas, and particularly described as follows:

Beginning at the Northeast corner of said league on the West bank of the Neches River; thence West with the North boundary line of said league to the Northwest corner of the same; Thence South with the west boundary line of said league to a point on said West boundary line from which a line projected East to the Neches River running parallel with the North boundary line of said league, will include between said North boundary line and the line so projected, 2578 acres; Thence North from the point so established on the Neches River with

its meanders to the place of beginning, being all of said Charles A. Felder league of land save and except the remainder thereof, to-wit: The 1850 acres South of and adjoining said above described tract.

and that defendants take nothing as against plaintiffs and interveners on their cross-action for title and possession of said premises.

And in accordance with the agreement between plaintiffs and the interveners, the title to an undivided one-half of said land is vested in the plaintiffs, the heirs of William M. Goodrich, Deceased, and the title to the other undivided half of said land is vested in the heirs or devisees of James Morgan, deceased.

It is further ordered and adjudged that the plaintiffs and interveners have their writ of possession as many and as often as may be necessary to put them in possession of the above described premises.

It is further ordered, adjudged and decreed that the plaintiffs and the interveners, as above named, do have and recover of and from the Houston Oil Company of Texas and the Texas Builders Supply Company, defendants herein, the sum of \$1286.00 as damages, with interest thereon at the rate of six per cent per annum from the date of this judgment. The said sum of \$1286.00 in accordance with agreement of plaintiffs and interveners, to be divided between them as above provided with reference to the said land; that is, plaintiffs one-half and interveners one-half.

It appearing to the court by the record in this case, that the said damages of \$1286.00 and all interest on same, as aforesaid recovered, is now paid and discharged by the Houston Oil Company of Texas paying off the execution, issued on the former judgment in this cause, it is ordered that no execution issue for said damages.

It is further ordered and adjudged that the plaintiffs and the interveners do have and recover of and from the defend-

ants Houston Oil Company of Texas, Kirby Lumber Company, Maryland Trust Company and the Texas Builders Supply Company, their costs in this behalf expended and that execution issue therefor.

And whereas, in said cause, on the second of December, 1914, the following order was entered by said Court:

"On this 2nd day of December, 1914, came on further to be heard the defendants' motion for restitution heretofore filed herein, the defendants having dismissed the claim for damages for timber cut, and it appearing to the court that this case having been again tried, and on the verdict of a jury and judgment of the court this day rendered, the same recovery has been had as by the former judgment rendered herein by this court on 7th day of December, 1912, it is therefore ordered, adjudged and decreed by the court that the said motion of defendants for restitution be in all respects denied; and it further appearing to the court by the record in this case that the said damages of \$1286.00 and all interest on same, as aforesaid, recovered by the former judgment rendered herein is now paid and discharged under protest by the Houston Oil Co. of Texas paying off the execution on the former judgment in this case, it is ordered that no execution issue for the aforesaid damages nor recovered by the judgment this day rendered. To which ruling of the court in denying the said motion for restitution the defendants and each of them in open court except, and give notice of appeal and notice of filing of writ of error to the honorable Circuit Court of Appeals for the Fifth Circuit.

And whereas, the said Houston Oil Company of Texas and Kirby Lumber Company and Maryland Trust Company have obtained a writ of error in the aforesaid suit and a citation directed to the said Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, the

heirs of William Goodrich, deceased, and the Texas Builders Supply Company, and Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and her husband, Louis L. Cox, citing and admonishing them to be and appear before the United States Circuit of Appeals for the Fifth Circuit, at the City of New Orleans, as fully set forth in the said writ of error, to which reference is hereby made.

Now, the condition of the above obligation is such that if the said Houston Oil Company of Texas and Kirby Lumber Company and Maryland Trust Company shall prosecute their writ of error to effect and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue.

Witness our hands, this, the 3rd day of February, A. D. 1915.

HOUSTON OIL COMPANY OF TEXAS,

By T. M. KENNERLY,

Its Agent and Attorney of Record.

KIRBY LUMBER COMPANY,

By T. M. KENNERLY,

Its Agent and Attorney of Record.

MARYLAND TRUST COMPANY,

By T. M. KENNERLY,

Its Agent and Attorney of Record.

MARYLAND CASUALTY COMPANY,

By EDWIN H. DUMBLE,

Attorney in Fact.

Countersigned by

R. C. PATTERSON,

Attorney in Fact.

Approved and ordered filed this the 3rd day of February, 1915.

GORDON RUSSELL,

U. S. District Judge.

ORDER TO TRANSMIT ORIGINAL PAPERS.

Entered in U. S. District Court on Feb. 3, 1915.

It is hereby ordered that the following original instruments be certified up and forwarded to the Honorable Circuit Court of Appeals for the Fifth Circuit, under the hand and seal of the Clerk of this Court, as a proper part of the record in this cause, to be considered by such other court as such, towit:

1.

The purported testimonio or duplicate original of title from the government of Coahuila and Texas to Charles A. Felder.

2.

The purported original deed from Charles A. Felder to John A. Veatch bearing date June 18, 1839, conveying to said Veatch the Felder league of land.

3.

Inventory and appraisement of property belonging to Penelope Blount, filed in the office of the County Clerk of Jasper County, Texas, February 24th, 1851, and purporting to have been signed by John Bevil.

4.

Statement and final settlement in the estate of Frances Bevil, deceased, filed in the office of the County Clerk of Jasper County, Texas, December 29th, 1858, and purporting to be sworn to and subscribed by John Bevil.

5.

Final exhibit in the estate of Frances Bevil, filed on January 3rd, 1857, in the office of the County Clerk of Jasper

County, Texas, purporting to have been signed by John Bevil, as Administrator.

6.

Photograph No. 1, made by J. C. Deane, of a portion of the sand pit on the Charles A. Felder League.

7.

Photograph No. 2, made by J. C. Deane, of a portion of the sand pit on the Charles A. Felder League.

8.

Photograph No. 3, made by J. C. Deane, of a portion of the sand pit on the Charles A. Felder League.

9.

Photograph No. 4, made by J. C. Deane, of a portion of the sand pit on the Charles A. Felder League.

10.

Photograph No. 5, made by J. C. Deane, of a portion of the purported protocol from the General Land Office at Austin, produced in court by the witness, C. B. Calloway, containing the purported signature of Charles A. Felder.

11.

Photograph No. 6, made by J. C. Deane, of a letter from the General Land Office at Austin, produced by C. B. Calloway, dated January 18, 1839, purporting to be written by John A. Veatch to J. P. Borden.

12.

Photograph No. 7, made by J. C. Deane, of a portion of the purported protocol, produced from the General Land Office by C. B. Calloway, purporting to show the signature of John A. Veatch on his application for his headright.

13.

Plot offered in evidence by defendants in connection with the testimony of H. A. Woods.

14.

Two plots offered in evidence by plaintiffs and interveners in connection with the testimony of the witness T. E. Danziger.

GORDON RUSSELL,

Judge of the District Court of the
United States for the Eastern
District of Texas.

CLERK'S CERTIFICATE.

I, J. R. Blades, Clerk of the District Court of the United States for the Eastern District of Texas, in the Fifth Circuit, do hereby certify that the foregoing is a full, true and correct transcript of the record, bill of exceptions, assignment of errors, and all the proceedings in cause No. 408, at law, wherein Cornelia G. Goodrich, et al., are plaintiffs, and Houston Oil Company of Texas, et al., are defendants, as fully as the same remain on file and of record in my office at Beaumont; and that same constitutes the return to the original writ of error and citation annexed hereto.

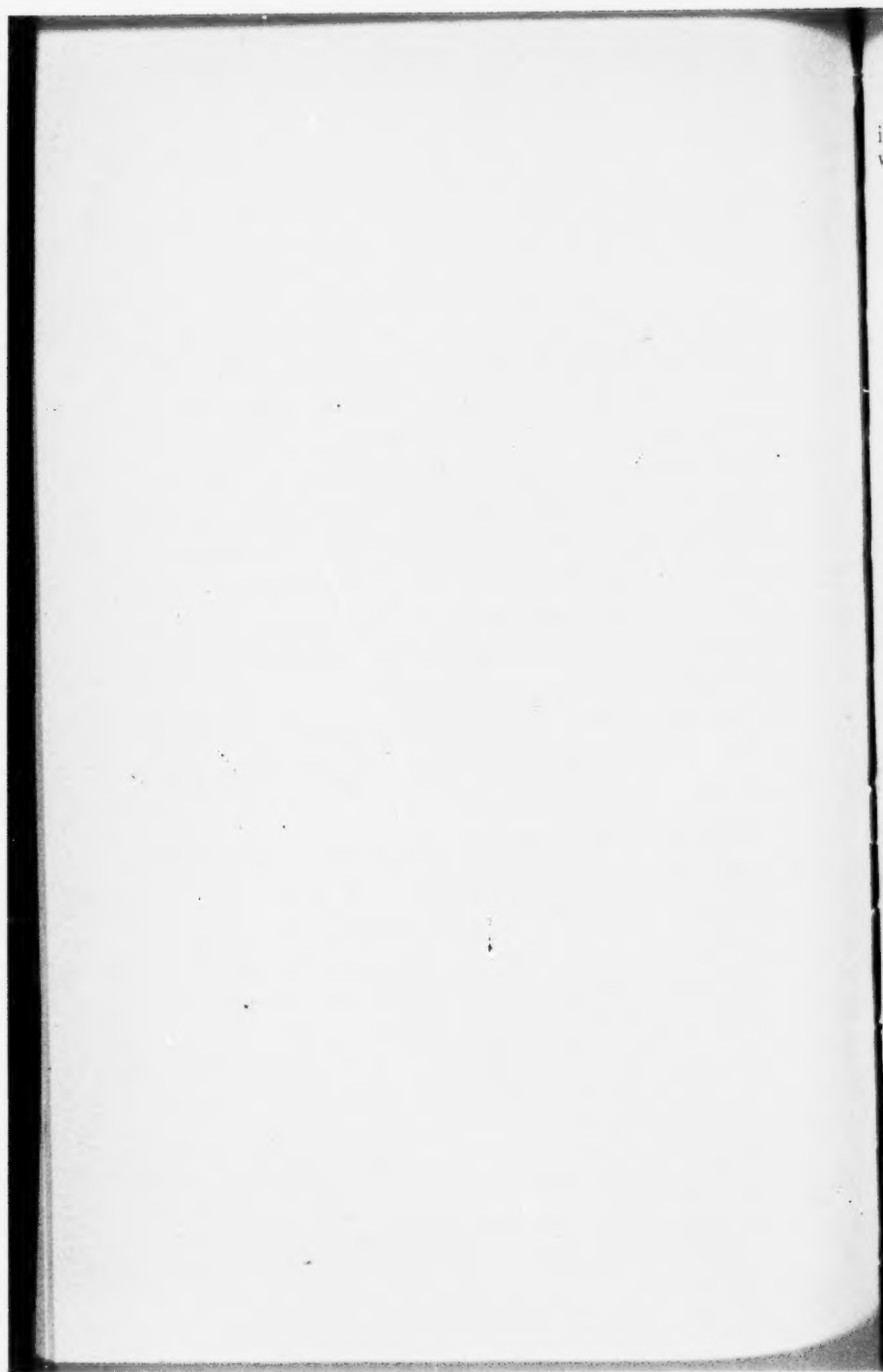
I further certify that the fourteen original instruments are also transmitted in obedience to order appearing on pages 968-970 herein.

Witness my hand officially and the seal of said court at Beaumont, this the 1st day of March, A. D. 1915.

J. R. BLADES, Clerk,

[Seal]

By C. C. BUMPAS, Deputy.



That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Motion for Restitution.

Filed March 10th, 1915.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2748.

HOUSTON OIL COMPANY OF TEXAS et al., Plaintiffs in Error,

versus

CORNELIA G. GOODRICH et al., Defendants in Error.

Come now the Houston Oil Company of Texas, the Maryland Trust Company, Trustee, and the Kirby Lumber Company, and show to the Court in this cause as follows:

I.

That on and prior to June 7, 1911, your petitioners were in both actual and constructive possession of the tract of land involved in this suit, to-wit:

"In Hardin County, Texas, and being a part of a league granted by the Mexican Government to Charles A. Felder and particularly described as follows: Beginning at the N. E. corner of said league on the West bank of the Neches River; thence West with the N. B. line of said league to the N. W. corner of the same: Thence South with the W. B. line of said league to a point on said W. B. line from which a line projected East to the Neches River running parallel with the N. B. line of said league, will include between said N. B. line and the line so projected 2578 acres; Thence North from the point so established on the Neches River with its meanders to the place of beginning, said tract containing 2578 acres of land more or less."

Holding and claiming same by regular chain of conveyances from and under the sovereignty of the soil, and also by and under the three, five and ten year statutes of limitation in the State of Texas, all of which is fully sworn by the Transcript of Record in this cause on file in this Court, to which reference is made.

II.

That on said June 7, 1911 Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., and Mary W. Montgomery, a feme sole, citizens of the City and State of New York, Edward L. Montgomery and wife, Mary W. Montgomery, citizens of Sullivan County, State of New York, and Helen M. Krasica and husband, Jean Krasica, citizens of the City of Paris, Republic of France, (hereinafter referred to as plaintiffs in the Court below) filed this suit in the United States District Court for the Eastern District of Texas, at Beaumont, against your petitioners and the Texas Builders' Supply Company, a corporation having its domicile in the City of Beaumont, Jefferson County, Texas, to recover title and possession of seventeen hundred and twenty-one (1721) acres of the above described tract of land. (Rec. pp. 2-4.)

III.

That on the first day of April, 1912, Fannie M. Steadman, a feme sole, Mary M. Steadman, a feme sole, and Ophelia M. Cox and husband, Louis L. Cox, all citizens and residents of Franklin County, Kentucky, (hereinafter referred to as intervenors in the court below) intervened in said cause, and in such petition in intervention brought their action against petitioners and said Texas Builders' Supply Company, to recover title and possession of the said twenty-five hundred and seventy-eight (2578) acres of land above described. (Rec. pp. 7-9.)

IV.

That thereafter both plaintiffs in the Court below and intervenors in the Court below filed amended pleadings, bringing in issue as between them and your petitioners, and as between themselves, the title and possession of the said tract of land above described: (Rec. p. 4.) (Rec. p. 9.) And thereafter your petitioners (who are defendants in the Court below) filed their answers forming an issue with said plaintiffs and intervenors for the title and possession of said tract of land, and likewise the Texas Builders' Supply Company filed its answer and cross action. (Rec. p. 22.)

V.

That, upon the issue formed by said pleadings, trial of this cause was had in the said United States District Court for the Eastern District of Texas, at Beaumont, beginning on December 2, 1912,

and on December 7, 1912 a judgment was rendered in favor of the plaintiffs in the Court below and the intervenors in the Court below, against petitioners and against the Texas Builders' Supply Company, for title and possession of said tract of land, and that said plaintiffs in the Court below and intervenors in the Court below do have and recover of and from the Houston Oil Company of Texas and the Texas Builders' Supply Company the sum of twelve hundred and eighty-six dollars (\$1286.00) as damages, with interest thereon at the rate of six per cent (6%) per annum from the date thereof until paid, besides all costs of Court. (Rec. p. 26.)

VI.

That petitioners were, at the time of the trial of said cause, and had been continuously since the filing of this suit and for many years previously, in actual and constructive possession of said tract of land.

VII.

That forthwith upon the rendition of said judgment against petitioners they began proceedings to remove said cause by writ of error to this Honorable Court, for the purpose of reviewing the action of the said District Court for the Eastern District of Texas in said cause in rendering said judgment, and in due time made application for and were granted a writ of error and filed in this Court the transcript of record provided for and required by law, which was docketed in this Court as No. 2524, styled Houston Oil Company of Texas, et al., plaintiffs in error, vs. Cornelia G. Goodrich, et al., defendants in error, all of which is of record manifest in this Court, to which petitioners refer.

VIII.

That thereafter this cause came on for hearing in this Court, and on February 10, 1914, this Court entered its judgment and order reversing the said judgment of December 7, 1912, entered by said District Court, and remanding this cause to said District Court for a new trial, all of which is of record manifest in this Court, to which reference is hereby made.

IX.

That thereafter the said plaintiffs in the Court below and intervenors in the Court below and defendants in error in said cause No. 2524 applied to the Supreme Court of the United States for writ of certiorari to this Court, to review the decision of this Court in said cause, which writ of certiorari was refused by the Supreme Court of the United States. And thereupon the mandate of this Court issued,

reversing said judgment and remanding this cause to said District Court, which mandate was filed in the District Court on June 16, 1914. (Rec. p. 36.)

X.

That the record, including bill of exceptions, etc., on the prosecution of the petitioners' writ of error from said judgment on December 7, 1912, was unusually large and voluminous, and that while petitioners were engaged in preparation of said bill of exceptions and the transcribing of the record, including the testimony of numerous witnesses in this cause, plaintiffs in the Court below and intervenors in the Court below caused to be issued, on February 25, 1914, against the Houston Oil Company of Texas and the Texas Builders' Supply Company, a writ of execution to collect from said Houston Oil Company of Texas and said Texas Builders' Supply Company the said sum of twelve hundred and eighty-six dollars (\$1,286.00), with interest thereon, and also to collect the costs of Court adjudged against said Houston Oil Company of Texas and said Texas Builders' Supply Company; which writ of execution plaintiffs in the Court below and intervenors in the Court below placed in the hands of the United States Marshal for the Eastern District of Texas and directed said Marshal to demand payment of same of the Houston Oil Company of Texas and the Texas Builders' Supply Company, and to levy upon the goods and chattels, lands and tenements, of the said persons. That thereupon said Marshal demanded of the said Houston Oil Company of Texas the payment of said sum of money and said interest and said costs of Court, and threatened in default of payment thereof to levy upon the properties aforesaid of the said company, and the said Houston Oil Company of Texas, not in recognition of said judgment nor of any persons' rights thereunder, but to prevent the levy of said execution upon its properties, and under protest, and only because of the issuance and threatened levy of said execution, paid to the said Marshal on March 11, 1913, the sum of fifteen hundred and six and 37/100 dollars (\$1506.37), said sum being the principal of said judgment, amounting to twelve hundred and eighty-six dollars (\$1286.00), and interest thereon for three (3) months and four (4) days, amounting to twenty and 14/100 dollars (\$20.14), and the costs of Court, amounting to two hundred and 23/100 dollars (\$200.23). (Rec. pp. 31-33.)

XI.

That plaintiffs in the Court below and intervenors in the Court below likewise caused, on February 25, 1913, the issuance out of said District Court of a writ of possession for said property, directed to the Marshal of the Eastern District of Texas, commanding such officer to take from the possession of petitioners and the Texas Builders' Supply Company (the Texas Builders' Supply Company being the tenant of petitioners) the possession of said tract of land,

and to place same in the possession of plaintiffs in the Court below and intervenors in the Court below, and to eject petitioners and their tenant therefrom. Thereupon said writ of possession was placed by plaintiffs in the Court below and intervenors in the Court below in the possession of the Marshal of the Eastern District of Texas, and was executed by him on February 27, 1913, by ejecting petitioners and their tenant from said tract of land, and by placing plaintiffs in the Court below and intervenors in the Court below in full and actual possession thereof. (Rec. pp. 34-36.)

XII.

That petitioners, at the time of the execution of said writ of possession by the said Marshal, were in actual and constructive possession of said tract of land, and had so been continuously since the date of said judgment of December 7, 1912, and had so been continuously in such actual and constructive possession as hereinbefore alleged since the filing of this suit, and for many years previous thereto, all of which is fully shown by the record in this cause.

XIII.

That plaintiffs in the Court below were represented in said Court, and are represented in this Court, by W. D. Gordon, Esquire, and by Thomas J. Baten, Esquire both of the City of Beaumont, Jefferson County, in the Eastern District of Texas. That intervenors in the Court below were represented in said Court, and are represented in this Court, by H. M. Whittaker, Esquire, and E. E. Easterling, Esquire, both of Beaumont, Jefferson County, in the Eastern District of Texas, all four of whom are attorneys at law duly admitted to practise in said District Court and in this Court.

XIV.

That said sum of fifteen hundred and six and 37/100 dollars (\$1506.37), so paid over to the United States Marshal for the Eastern District of Texas on said execution as hereinbefore set forth, is either in the possession of said United States Marshal or has been paid over by him to said W. D. Gordon, Thomas J. Baten, H. M. Whittaker, or E. E. Easterling, to one or all of them.

XV.

That since plaintiffs in the Court below and intervenors in the Court below were placed in possession of said tract of land by the said Marshal, as aforesaid, they have remained in actual possession thereof, and are now in actual possession thereof.

XVI.

That since plaintiffs in the Court below and intervenors in the Court below have been placed, by the said Marshal, in possession of said tract of land as aforesaid, they and their said attorneys, towit,

W. D. Gordon, Thomas J. Baten, H. M. Whittaker, and E. E. East-erling, have cut or caused to be cut from said tract of land large quantities of pine timber theretofore standing thereon, the exact quantity of which petitioners are unable to state but allege that same amounts to fully more than four million feet, and that said persons have sold or otherwise disposed of same and have received the proceeds of the sale or disposition thereof, amounting to a large sum of money, the exact amount of which petitioners are unable to say, but allege that it amounts to fully seventy-five thousand dollars (\$75,000.00) which said sum of money petitioners are informed and believe, and upon such information and belief allege the facts to be, that said plaintiffs in the Court below and intervenors in the Court below, or their said attorneys, or each and all of them, still have in their possession in the Eastern District of Texas.

XVII.

That said plaintiffs in the Court below and intervenors in the court below and their said attorneys have, since they have been placed in the possession of said tract of land by the Marshal as aforesaid, removed or caused to be removed therefrom large quantities of sand, the exact quantity of which petitioners are unable to state, but allege that same amounts to fully one thousand cars, of the value of two dollars per car. And petitioners are informed and believe, and upon such information and belief allege the facts to be, that said plaintiffs in the Court below and intervenors in the Court below and their said attorneys still have in their possession in the Eastern District of Texas proceeds of the sale of said sand, amounting to the sum of two thousand dollars.

XVIII.

That there is still standing upon said tract of land a large quantity of both pine and hardwood timber, and plaintiffs in the court below and intervenors in the court below are claiming and insisting that they are entitled to cut, remove and take away said pine and hardwood timber, and are threatening to cut, take and remove same, and plaintiffs are informed and believe that if said persons are permitted to remain in possession of said tract of land, they will so cut and remove same to your petitioners' great damage, so that at the end of this litigation the subject matter thereof will not be present upon which the process of the Court and the decree of the Court may act, but will have been dissipated, destroyed and carried away by such persons.

XIX.

That, at the time of the filing of this motion, the said plaintiffs in the Court below and intervenors in the Court below and their said attorneys were actively engaged, from day to day, and from week to week, and from month to month, in taking and removing sand for commercial purposes from said tract of land, which sand is valuable; and if such persons are permitted to remain in posses-

sion of said tract of land, they will so continue to remove such sand to petitioners' great damage, so that the subject-matter of this litigation will not be present upon which the final decree may act at the termination hereof.

XX.

That forthwith upon the reversal of the judgment of December 7, 1912, by this Court, and the issuing and filing of the mandate in the Court below, petitioners were entitled to have possession of the said tract of land and were entitled to restitution thereof, and were entitled to have possession of the sum of money held in the hands of plaintiffs in the Court below and intervenors in the Court below and their attorneys, as the proceeds of the sale of the timber therefrom, and were entitled to have possession of said money in the hands of plaintiffs in the Court below and intervenors in the Court below and their attorneys, as the proceeds of the sale of sand from said tract of land, and were entitled to restitution of each of the sums of money paid, as hereinbefore set forth, as damages, and interest thereon, and costs of Court, by the Marshal of the said Eastern District of Texas, aggregating the sum of fifteen hundred and six and 37/100 dollars (\$1506.37).

XXI.

That at the First Term of said District Court, after the filing of the mandate of this Court therein, petitioners filed their motion in said Court, praying restitution of said premises and of said sum of money paid as damages, interest and costs, as aforesaid, and praying restitution of the proceeds of the sale of said timber, as aforesaid, all of which is of record manifest. (Rec. pp. 36-45-46.)

XXII.

That plaintiffs in the Court below and intervenors in the Court below did not see fit to deny the allegations of said motion for restitution, only excepting thereto. (Rec. p. 49.)

XXIII.

That thereupon, on November 17, 1914, petitioners presented said motion to said District Court, and the Court refused to rule thereon, except that the Court denied that part of petitioners' motion which set forth that petitioners could not be legally forced to go to trial upon the merits of said cause until restitution of said premises and of the said moneys had been made; and said Court refused to rule upon the merits of said motion or upon the exceptions thereto, other than as above stated, until after the trial of said cause upon the merits, and forced petitioners to go to trial upon the merits without restitution of said premises and said moneys.

XXIV.

That thereafter the said cause proceeded to trial in the said District Court before a jury, and, at the conclusion of the evidence, the

Court refused to submit to the jury the question of the respective titles of the parties, save and except under the Five Year Statute of Limitation, and held that plaintiffs in the Court below and intervenor in the Court below were entitled to recover said premises, unless petitioners had title thereto under the Five Year Statute of Limitation of the State of Texas, and submitted to the jury the question of whether or not such petitioners so had title under said Five Year Statute of Limitation. That many other questions were presented by the evidence in said cause, as is fully shown by the assignments of error herein, but the Court only permitted the jury to determine the one question mentioned.

XXV.

That thereupon the jury returned its verdict into Court, finding in favor of plaintiffs in the Court below and intervenors in the Court below upon said issue of five years' limitation, and against petitioners and the Texas Builders' Supply Company. Whereupon the Court, over the objections and exceptions of the petitioners, on December 1, 1914, entered judgment in favor of plaintiffs in the Court below and intervenors in the Court below, against petitioners, and the Texas Builders' Supply Company, for title and possession of said premises and for the sum of twelve hundred and eighty-six dollars (\$1286.00) as damages, with interest thereon at the rate of six per cent (6%) per annum, together with all costs of Court. (Rec. pp. 806-809.)

XXVI.

That after the return of said verdict and the entry of said judgment and on December 2, 1914, the Court entered upon petitioners' motion for restitution the following order:

"On this 2nd day of December, 1914, came on further to be heard the defendants' motion for restitution heretofore filed herein, the defendants having dismissed the claim for damages for timber cut, and it appearing to the Court that this case having been again tried, and on the verdict of the jury and judgment of the Court this day rendered, the same recovery has been had as by the former judgment rendered herein by this Court on 7th day of December, 1912, it is therefore ordered, adjudged and decreed by the Court that the said motion of defendants for restitution be in all respects denied; and it further appearing to the Court by the record in this case that the said damages of \$1286.00 and all interest on same, as aforesaid, recovered by the former judgment rendered herein is now paid and discharged under protest by the Houston Oil Co. of Texas paying off the execution on the former judgment in this case, it is ordered that no execution issue for the aforesaid damages nor recovered by the judgment this day rendered. To which ruling of the Court in denying the said motion for restitution the defendants and each of them in open Court, except, and give notice of appeal and notice of filing of writ of error to the honorable Circuit Court of Appeals for the Fifth Circuit."

XXVII.

That thereupon petitioners filed their motion for new trial (Rec. p. 811), and upon same being overruled by the Court (Rec. p. 857), filed their assignments of error (Rec. p. 864), applied for and were granted writ of error (Rec. p. 862 and p. 960), and it was ordered in said writ of error by the Honorable Gordon Russell, Judge of the United States District Court for the Eastern District of Texas, in granting said writ of error that same should operate and act as a supersedeas, upon petitioners' giving bond in the sum of five thousand dollars (\$5,000.00), conditioned as required by law. That thereupon, on February 3, 1915, and within sixty (60) days (exclusive of Sundays) after the rendition of said judgment of December 1, 1914, petitioners filed their supersedeas bond, conditioned as required by law, and same was approved. (Rec. pp. 960-967.)

XXVIII.

That thereupon, within thirty (30) days after the granting of said writ of error, as aforesaid, petitioners had made up, certified to by the Clerk of said trial Court, and filed in this Court, a transcript of all the proceedings in this cause, as required by law, and by rules of this Court, and this case has now been docketed in this Court and is now pending upon petitioners' writ of error in this Court, styled No. 2748, Houston Oil Company of Texas, et al., plaintiffs in error, vs. Cornelia G. Goodrich, et al., defendants in error, and this Court has full and complete jurisdiction of said cause, and the said judgment of December 1, 1914, and said order of December 2, 1914, have been fully and completely superseded and are of no further force nor effect.

XXIX.

That the said plaintiffs in the Court below and the said intervenors in the Court below are in possession of said property and of said moneys wholly without authority of law and have no right whatsoever to the possession thereof, but petitioners are entitled to the possession of same and all and every part thereof, and petitioners are entitled to have said premises and said moneys turned back to them, to be held by them until final determination of this cause by this Court, or by the lower Court, in the event the judgment is reversed and remanded.

Wherefore, petitioners pray:

(1) That this motion be set down for hearing before this Court, and that such notice be given to plaintiffs in the Court below and intervenors in the Court below as may be required by law and the rules of the Court.

(2) That an order be entered, requiring the plaintiffs in the Court below and intervenors in the Court below (defendants in error here) and their said attorneys to make restitution of said premises and of said moneys and to turn same over to the petitioners, and that an order issue to the Marshal of the Eastern District of Texas

directing him to seize the said premises and said moneys and place petitioners in possession thereof, and that petitioners have all and appropriate process of Court to enforce the Court's orders herein, and that petitioners be permitted to remain in possession of said premises and said moneys until the final determination of this cause as hereinbefore set forth.

(3) Or, should your Honors determine that proper relief can be afforded petitioners by such course, that petitioners be only placed in possession of said premises, to be held by them and used and enjoyed by them until final judgment herein, and that the said moneys above set forth be ordered paid in to the registry of this Court, or of the District Court of the United States for the Eastern District of Texas, to be held in the registry of the Court until final judgment herein.

(4) Or, should your petitioners be mistaken in the relief to which they are entitled, they pray that any and all orders may enter herein to which they may be entitled, either by law or in equity, and under the rules of the Court, to the end that the subject-matter of this litigation may be maintained and held intact, so that the final judgment and decree entered in this cause may operate thereon, and that full and ample justice may be done to these petitioners in the event they shall finally prevail in this litigation.

H. O. HEAD,
OSWALD B. PARKER,
T. M. KENNERLY,
PARKER & KENNERLY,

*Attorneys for Houston Oil Company of Texas,
Maryland Trust Company, and Kirby Lum-
ber Company, Plaintiffs in Error.*

STATE OF TEXAS,
Harris County:

Before me, the undersigned authority, on this day personally appeared A. W. Standing, General Manager and Agent of the Houston Oil Company of Texas and of the plaintiffs in error herein, who, being by me first duly sworn, says on oath that the allegations contained in the foregoing motion are true and correct.

A. W. STANDING.

Sworn to and subscribed before me, this, the 8th day of March,
A. D. 1915.

[SEAL.]

WESLEY HUNEFELT,
Notary Public, Harris County, Texas.

We respectfully certify that, in our opinion, the above and foregoing motion and petition is well founded in point of law, and ought to be granted.

T. M. KENNERLY,
*Attorneys Houston Oil Company of Texas,
Maryland Trust Company, and Kirby Lum-
ber Company.*

Reply of Defendants in Error to Motion for Restitution.

Filed April 8th, 1915.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2748.

HOUSTON OIL COMPANY OF TEXAS et al., Plaintiffs in Error,
vs.
CORNELIA G. GOODRICH et al., Defendants in Error.

Reply of Defendants in Error to Motion for Restitution.

Come now defendants in error in the above styled and numbered cause, and answering the motion of plaintiffs in error for restitution, show to the court:

1.

That defendants in error, as plaintiffs and interveners brought this suit in the Eastern District of Texas at Beaumont, to recover from the plaintiffs in error, as defendants therein, the title and possession of the 2578 acres of land described in paragraph 1 of the motion of plaintiffs in error, and to recover \$1,286 as damages for sand taken and removed by defendants from Sand Pit "F" on said tract of land, and that on December 7th, 1912, judgment was rendered in said court in favor of plaintiffs and interveners awarding to them title and possession of said tract of land and damages in the sum of \$1,286 for the sand taken from Sand Pit "F" (Rec. p. 26).

2.

That a writ of possession was issued on said judgment and executed by the United States Marshal for the Eastern District of Texas, on the 27th day of February, 1913, by placing plaintiffs and interveners in possession of said land. (Rec. pp. 34-36.) And execution was issued on said judgment and executed by said Marshal by collecting from plaintiffs in error the amount of said judgment, \$1,286 interest and costs of suit. (Rec. pp. 31-33.)

3.

That plaintiffs in error appealed said cause to this Honorable Court, which was docketed in this court as No. 2524, styled Houston Oil Company of Texas, et al., Plaintiffs in Error, vs. Cornelia G. Goodrich, et al., Defendants in Error; and on February 10th, 1914, this court decided that the lower court was right in holding that the plaintiffs and interveners held the superior record title to the land, claiming through the deed from the original grantee, Charles A. Felder, to John A. Veatch, but held that under the evidence the issue of limitation of five years should have been submitted by the

lower court to the jury for its finding, and upon that ground and that ground alone, reversed and remanded the case for a new trial in accordance with the opinion of this court, all of which is of record manifest in this court, to which reference is hereby made.

4.

That plaintiffs in error did not apply on said appeal in this court to be restored to the possession of the land or for the money collected from them for the sand, and although the mandate of this court was filed in the District Court at Beaumont, on June 16, 1914, they first filed their motion in the district court for restitution on the 12th day of November, 1914 (Rec. p. 45). That by paragraphs 1, 2 and 3 of Sec. 12 of said motion they prayed to have restored to them the possession of the tract of land and for \$1,506.37 collected from them by the United States Marshal for sand, interest and costs of court, and for the proceeds of the sale of the timber cut and removed from said tract of land since the date of said judgment, (Rec. p. 42-43), estimated in Sec. 11 of said motion to be \$55,000. (Rec. p. 41).

5.

That defendants presented said motion to the district court on the morning of November 17th, 1914, the day the case was set for trial on its merits in that court, and because the case was set for trial on that date the court refused to rule on the motion for restitution, except that the court denied that part of petitioners' motion which set forth that petitioners could not be legally forced to go to trial upon the merits of said cause until restitution of said premises and the said money had been made. And upon said ruling of the court all parties announced ready for trial and the court proceeded to impanel the jury and hear the case; that the defendants did not offer any evidence that plaintiffs and interveners had cut and removed timber from said land, or that they had removed sand from the land, or in any way damaged defendants by withholding from them the possession of said land, although defendants by cross action had alleged that plaintiffs and interveners had ejected them from the land and were wrongfully in possession thereof. Said cross action against plaintiffs and interveners being in part as follows:

"And for its cause of action against plaintiffs and each of them, this defendant alleges that heretofore, to-wit: on or about the 1st day of March, A. D. 1911, this defendant was lawfully seized and possessed of the lands and premises described in plaintiffs' original petition filed herein, holding and claiming the same in fee simple, and that on said last named date, in manner and form as alleged in plaintiffs' original petition said plaintiffs above named, and each of them, as trespassers, unlawfully entered upon said land and ejected said defendant therefrom and that each of them unlawfully withheld from said defendant the possession of said land and premises to its damage in the sum of \$5,000.00. That the reasonable annual

rental value of said land and premises is the sum of \$1,721" (Defendant's cross action against plaintiffs, Rec. p. 14).

And the prayer upon said cross action against both plaintiffs and interveners is as follows:

"Premises further considered the defendant Houston Oil Company of Texas, prays that upon the final hearing hereof it do have and recover upon its cross action against plaintiffs herein and each of them, judgment for the title and possession of all the land in controversy herein, together with its rents, damages and costs of suit" (Rec. p. 15).

Defendant's cross action and prayer against interveners is in identically the same language. (Rec. p. 21-22).

6.

After all parties to the suit had introduced their evidence the court submitted to the jury the issue of limitation of five years, and upon a finding by the jury in favor of plaintiffs and interveners upon this issue, judgment was entered on December 1, 1914, for plaintiffs and interveners for the title and possession of the land and \$1,286 for the sand taken and removed by defendants from Sand Pit "F" (Rec. p. 806-809.) But it was ordered that no execution issue for said damages, the judgment in this respect being as follows:

"It appearing to the court by the record in this case that the said damages of \$1,286 and all interest on same, as aforesaid, is now paid and discharged by the Houston Oil Company of Texas, paying off the execution issued on former judgment in this cause, it is ordered that no execution issue for said damages" (Rec. p. 965).

And at the time of rendering said judgment and on December 2nd, 1914, defendants having dismissed from their motion for restitution the claim for damages for timber cut and removed, presented the same to the court, upon which the court entered the following order:

"On this 2nd day of December, 1914, came on further to be heard the defendants' motion for restitution heretofore filed herein, the defendants having dismissed the claim for damages for timber cut, and it appearing to the court that this case having been again tried, and on the verdict of the jury and judgment of the court this day rendered the same recovery has been had as the former judgment rendered herein by this court on 7th day of December, 1912, it is therefore ordered, adjudged and decreed by the court that the said motion of defendants for restitution be in all respects denied; and it further appearing to the court by the record in this case that the said damages of \$1,286 and all interest on same, as aforesaid, recovered by the former judgment rendered herein is now paid and discharged under protest by the Houston Oil Company of Texas, paying off the execution on the former judgment in this case, it is ordered that no execution issue for the aforesaid damages nor recovered by the judgment this day rendered. To which ruling of the court in denying the said motion for restitution the defendants and each of them in open court, except, and give notice of appeal and

notice of filing of writ of error to the Honorable Circuit Court of Appeals for the Fifth Circuit" (Rec. p. 810).

7.

As a ground for motion for new trial plaintiffs in error by sections 24 and 25 thereof (Rec. p. 827) complained that the court should grant them a new trial, because of his refusal to grant their motion for restitution, and by their 41, 42 and 43 assignments of error in this cause (Rec. p. 921-22-23), plaintiffs in error by their appeal in said cause, seek to reverse the lower court in refusing their motion for restitution.

8.

Wherefore, defendant in error contend in answer to said motion for restitution:

(1) That since plaintiffs in error applied to the lower court by motion and in their cross-action to be restored to the possession of the land and for damages to the premises and for the \$1,286, interest and costs of suit, which they had paid to the United States Marshal by virtue of an execution issued on said former judgment, and the refusal of the lower court to grant such restitution, is assigned as error in this court and is now pending on appeal by writ of error in the above styled and numbered cause; that the motion of plaintiffs in error attempting, as an original proceeding in this court, to ask for such restitution is out of place and ought not to be entertained.

(2) That plaintiffs in error, not having moved this court for restitution in the former appeal of this cause when the judgment of the lower court was reversed and remanded, but having made their motion for restitution for the first time in the lower court after the mandate of this court had been received by the lower court, this court is now without jurisdiction to hear the motion of plaintiffs in error attempting, as an original proceeding in this court, to ask for such restitution.

(3) Whether or not the lower court committed error in refusing plaintiffs' in error claim for restitution in the lower court is a matter for this court to determine by reviewing this question, as well as the other questions, that are presented by the assignments of error of plaintiffs in error now pending in this court by writ of error in this cause.

9.

But if wrong in the above contentions, defendants in error deny the right of plaintiffs in error to require of defendants in error the restitution prayed for, and respectfully present to your Honors, in support of the above contentions, the following brief of authorities:

10.

In the case of *Andrews vs. Thum*, reported in 18 C. C. A. p. 308, decided by the Circuit Court of Appeals for the First Circuit, the judgment of the lower court was reversed with direction to dismiss

the bill in the lower court. Thereupon John A. Andrew & Co. filed a petition in respect to the form of the mandate, asking that a provision be made therein requiring the complainants to make restitution of the \$2,500.00 paid by them under the erroneous decree. And after full argument, as stated by the court in its opinion, the court refused to make such order a part of its mandate and disposed of the question as follows:

"Whether restitution should be made of money paid in the progress of judicial procedure, where the interests of the parties defendants are or may be diverse, depends, oftentimes, on a question of fact. Perhaps a case might be so plain as to warrant this court in directing restitution in the court below, but this is not such a case. This application should be made to the Circuit Court. We do not, in the present hearing, pass upon any question relating to the merits of such application. The judgment already entered in this case is amended to read as follows:

"The decree of the Circuit Court is reversed and the case remanded with directions to dismiss the bill with costs. This court reserves to the defendants, John A. Andrews et al. liberty to file in the Circuit Court a petition for restitution of the sum paid by them to the complainants under the decree of the said Circuit Court of May 13, 1893, or to adopt other appropriate methods for presenting their claim for restitution, and to proceed thereon as that court may determine."

The Am. & Eng. Ency. of Pleading and Practice, Vol. 18 p. 877, states the rule for restitution in reversed and remanded cases as follows:

"Where judgment is not final.—Where the judgment of reversal is not final, and it appears that the court of review has not decided anything which renders it certain that the plaintiff has not rightly received payment under the reversed judgment, and that on a new trial the plaintiff may be finally adjudged entitled to hold it, restitution will as a rule be refused until the rights of the parties have been ascertained, or the plaintiff may be ordered to bring the money collected into court to await further directions."

In the case of Traum vs. Keiffer, 31 Ala. p. 136, it was held where a judgment in detinue for the plaintiff was reversed and remanded for a new trial, and satisfaction of an execution thereon was compelled by the sheriff, it was held proper to deny a motion of the defendant requiring the plaintiff to restore the property or return it to the sheriff before proceeding to trial.

Restitution is not always a matter of right. 18 Am. & Eng. Ency. of Pleading and Practice, p. 875, states the rule as follows:

"In a large number of cases it is held that restitution is not always a matter of right, and while it is usually granted on a reversal of a judgment, unless there is something peculiar in the case, the court in its discretion, may refuse it where justice and propriety do not call for it."

The case of Carlson vs. Winterson, 7 Misc. (N. Y.) 689, is stated by said Encyclopedia under said text to decide as follows:

"Where a judgment was reversed on appeal and remanded for a

new trial, a motion for restitution was made, but was denied when it appeared that since the submission of the motion the action had been retried in the lower court, and that the trial had again resulted in a verdict and judgment for the plaintiff."

The rule is well settled that where the facts do not appear of record, a scire facias, or some proceeding of that nature is necessary. 3 Cyc. p. 468.

Plaintiffs in error in the court below dismissed from their motion for restitution damages for timber cut and removed from the land although they had alleged the damages for this item in the sum of \$55,000.00. However, in their cross-action, they claimed damages and prayed for damages in the sum of \$5,000.00, and the annual rental value of \$1,721.00, but no evidence was introduced by them sustaining either of these items for damages. We do not think it could in good faith be contended that the amount and value of timber cut and sand removed from the premises, anywhere appears in this record, and, this being the state of the record, these facts could only be ascertained by proper pleading and evidence, and the trial court alone would have jurisdiction of such an original proceeding. The rule is thus stated in the case of the Bank of the United States vs. Bank of Washington, 6 Peters, U. S. R. 16, (Law Ed. Vol. 8 p. 204).

"On the reversal of the judgment, the law raises an obligation on the party to the record, who has received the benefit of the erroneous judgment, to make restitution to the other party for what he has lost. And the mode of proceeding to effect this object must be regulated according to circumstances. Sometimes it is done by a writ of restitution without a scire facias, when the record shows the money has been paid, and there is a certainty as to what has been lost. In other cases a scire facias may be necessary to ascertain what is to be restored. 2 Salk. 587, 588; Tidd's Prac. 936, 1137, 1138. And, no doubt, circumstances may exist where an action may be sustained to recover back the money. 6 Cowen, 297. But as it respects third persons, whatever has been done under the judgment whilst it remained in full force is valid and binding."

Plaintiffs in error by their motion apparently contend that their supersedeas in this case annuls the judgment of the trial court of December 2nd, 1914, and rendered it of no further "force nor effect." (Plaintiffs' in Error Motion p. 14.) The effect of the supersedeas is stated in 20 Ency. of Pleading and Practice, p. 1240, as follows:

"The effect of a supersedeas is not to vacate or annul the judgment or decree, but is merely to stay further proceedings upon it and leave matters in the condition in which they were when the supersedeas took effect, and until the appellate court can hear the parties on the questions involved."

Respectfully submitted,

W. D. GORDON,
THOS. J. BATEN,
E. E. EASTERLING,
H. M. WHITAKER,

Attorneys for Defendants in Error.

Argument and Submission.

Extract from the Minutes of April 8th, 1915.

No. 2748.

HOUSTON OIL COMPANY OF TEXAS
versus
CORNELIA G. GOODRICH et al.

On this day this cause was called, and, after argument by T. M. Kennerly, Esq., and H. O. Head, Esq., for plaintiff in error, and W. D. Gordon, Esq., and H. M. Whitaker, Esq., for defendants in error, was submitted to the Court.

Opinion of the Court.

Filed October 4th, 1915.

In the United States Circuit Court of Appeals, Fifth Circuit.

No. 2748.

HOUSTON OIL COMPANY OF TEXAS et al., Plaintiffs in Error,
versus
CORNELIA G. GOODRICH et al., Defendants in Error.

Error to the District Court of the United States for the Eastern District of Texas.

H. O. Head, Oswald S. Parker, and T. M. Kennerly, for plaintiffs in error.

W. D. Gordon, Thomas J. Baten, Eugene E. Easterling and H. M. Whitaker, for defendants in error.

Before Pardee and Walker, Circuit Judges, and Maxey, District Judge.

Memorandum Opinion by Walker, Circuit Judge.

By Direction of the Court:

1. The evidence adduced in the trial now under review bearing upon the issue as to the genuineness of the deed from the original grantee of the land sued for, Charles A. Felder, to John A. Veatch, which was a link in the chain of title asserted by the plaintiffs, was like that considered in the opinion rendered on the former writ of error (Houston Oil Company of Texas vs. Goodrich, 213 Fed. 136) in that it was not such as to require a submission by the Court to the jury of the issue of forgery. There was no evidence which

furnished substantial support for a finding against the genuineness of that instrument.

2. It seems that the court did not err in excluding the evidence offered as a record of a deed of Charles A. Felder to William A. Daniels, which was a link in the chain of the record title relied on by the defendants. The book containing the offered copy of the instrument was one which had been used for recording conveyances in the pseudo county or district of Menard, which never had any legal existence because of the constitutional invalidity of the statute which undertook to create it. The only statute to which we have been referred as having the effect of giving legal validity to such a record is an act of January 6, 1844 (2 Gammel's Early Laws of Texas, p. 922), which by its express terms is confined in its operation to "deeds, and other instruments of writing, which have been duly proven before the proper officers of such district, or other legal officers." The instrument in question did not purport to have been so proven, the acknowledgment of it having been taken before a notary public, an officer who at the time the deed purported to have been made did not have authority to take acknowledgments of conveyances of land.

3. Even if what was offered be regarded as legal evidence of the making of the deed of Felder to Daniels, the exclusion of that evidence was error without injury unless Felder's deed of later date to Veatch, through which the plaintiffs deraigned title, was in some legal way deprived of the precedence which it acquired by its prior record. A statute of 1907 (Acts of 1907, page 208) which is relied on in this connection does not have the effect which is sought to be attributed to it. That statute by its terms does not apply as against a prior recorded conveyance under which an adverse claim to the land described in it was asserted during the first ten years that the instrument needing validation was upon the record. It undertakes to validate the record of an instrument which, when it was registered for record, was not entitled to be recorded because not duly proven only when "no claim adverse or inconsistent to that evidenced by such instrument shall have been asserted during that ten years." *Sims v. Sealy*, 116 S. W. 631. That the adverse and inconsistent claim under the prior recorded deed of Felder to Veatch was asserted within that time clearly appears from the public records, which show sales and conveyances of that claim by successive holders of it during that period. The plaintiffs in error can derive no benefit from the statute referred to, as the adverse and inconsistent claim of title based upon the same grantor's prior recorded deed to Veatch is shown by the public records not to have been dormant during the period mentioned by the statute. Two other statutes which have been referred to in this connection, one enacted in 1841 and the other in 1860 (2 Gammel's Early Laws of Texas, p. 632; 4 *Ib.*, p. 1437), each validating the record of instruments which, when they were registered for record, were not entitled to be recorded, plainly have reference to instruments found copied in duly authorized books of public record, and not to instruments found copied in a book, such as the Menard County book which was produced, not entitled to recogni-

tion as a legal public record except in so far as such recognition has been provided for by statute.

4. The burden of proving that the deed of Felder to Veatch was unsupported by a valuable consideration, or that the grantee therein had notice of a prior conveyance by his grantor, was upon the defendants. *Kimball v. Houston Oil Company*, 100 Texas 336; *Houston Oil Company v. Kimball*, 103 Tex. 94. The evidence was not such as to warrant a finding by the jury that such burden was sustained.

5. No claim of the defendants to the land sued for based upon a statute of limitations other than the five years' statute was so supported by evidence of the required continuous and uninterrupted adverse possession for the prescribed period as to entitle the defendants to a submission of the issue to the jury. The evidence on the issue tendered as to adverse possession for five years was not such as to require a finding by the jury in favor of the defendants on that issue. The evidence bearing on that issue was submitted to the jury under instructions not subject to adverse criticism from the plaintiffs in error.

6. Much has been said in the argument of the counsel for the plaintiffs in error about the failure of the defendants in error and those under whom they claim to acquire possession of the land during the long period of the existence of the claim which is asserted by the suit. The only statute relied upon, or of which we are aware, other than ordinary statutes of limitation in favor of adverse possessors, which purports to give to a grantee's failure to assert the right to land which a conveyance to him purported to confer the effect of impairing that right in favor of the holder of an inconsistent claim is the one of 1907 above mentioned, the terms of which, as above stated, make it inapplicable to the facts of this case. In the absence of a statute having such an effect, the holder of the legal record title to land, not divested by another's adverse possession for a period sufficient to confer title, or in any other way recognized by law, is not deprived of the right to sue for and recover the land as a consequence of the previous failure of himself or of his predecessors in title to exercise the rights of dominion and possession which the title conferred. The defendants having failed in their attack on the record title relied upon by the plaintiffs, they could not, without sustaining any of the asserted claims to the land sued for which were based upon alleged adverse possession of it for periods sufficient to bar plaintiff's right to recover, be entitled to hold it as against the plaintiffs because of the previous inactivity of the latter or of their predecessors in title in asserting their rights. In the absence of a statute having such an effect, the age of the record title to land, though unaccompanied by possession, does not, except in favor of an adverse possessor, impair the rights it confers on the holder of it unless it has been divested or the right to assert it has been lost or barred in some way provided for by law.

The conclusion is that the record does not show the commission of any reversible error, and the judgment is, therefore,

Affirmed.

Judgment.

Extract from the Minutes of October 4, 1915.

No. 2748.

HOUSTON OIL COMPANY OF TEXAS et al.
versus
CORNELIA G. GOODRICH et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof. It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause, be, and the same is hereby affirmed;

It is further ordered and adjudged that the plaintiffs in error, Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, and the surety on the writ of error bond herein, Maryland Casualty Company, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Petition for Rehearing.

Filed October 22nd, 1915.

No. 2748

In the United States Circuit Court of Appeals, Fifth Circuit.

HOUSTON OIL COMPANY OF TEXAS et al., Plaintiffs in Error,
vs.
CORNELIA G. GOODRICH et al., Defendants in Error.

Error to the United States Circuit Court of the Eastern District of Texas, at Beaumont.

Motion of Plaintiffs in Error for Rehearing, and Remarks in Support Thereof.

First Ground for Rehearing.

The Court erred in refusing to sustain the Fourth Assignment of Error (Rec., p. 875), wherein plaintiffs in error complained of the refusal of the Trial Court to give Plaintiffs' in Error Special Charge No. 9 (Rec., p. 769), as follows:

"You are instructed that it is claimed by the defendants in this cause that Charles A. Felder, on the 10th day of June, 1839, made,

executed and delivered to William A. Daniels a deed conveying to the said Daniels the Charles A. Felder league in Hardin County, Texas, a part of which league of land is in controversy herein, and it is a question of fact for you to determine whether such deed from the said Charles A. Felder to the said Wm. A. Daniels was in fact made, executed and delivered; you are instructed that the making, execution and delivery of a deed may be shown by circumstances. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury, and if you shall believe, upon a consideration of all the facts and circumstances in the case before you, that the circumstances are consistent with the inference or presumption that such a deed was made by the said Felder to the said Daniels, as claimed, and that in view of all the circumstances, it is more reasonably probable that such deed was made than it was not, then the jury is at liberty, and it is the jury's duty to presume and find that such deed, as claimed, was in fact made, executed and delivered by the said Felder to the said Daniels, and to give the same the effect to which it is entitled, as elsewhere explained in the Court's charge."

Because the Trial Court admitted in evidence the original Deed Record of Menard County, Texas, upon which record appeared said deed, which was shown to have been spread thereon February 23, 1842, and to have remained thereon since said time, as a circumstance in proof of the making, execution and delivery of said deed; and, in addition thereto, Plaintiffs in Error, claiming under said deed by chain of general warranty conveyances, offered evidence which was undisputed, showing that they, and their predecessors in title so claiming under said deed, had continuously claimed the tract of land in controversy since said time, and had continuously since that time exercised acts of ownership thereof by occupying same by tenant, cutting and removing timber therefrom, taking sand therefrom, claiming same openly in the community, continuously rendering and paying taxes thereon, all of which continued down to the time of the filing of this suit and afterwards, and the undisputed evidence showed no rendition nor payment of taxes by Defendants in Error and those under whom they claimed, and no other acts of ownership, and no claim other than a few conveyances thereof by quitclaim deed, all of which evidence was sufficient to raise the issue of whether or not such deed from Felder to Daniels was made, executed and delivered as claimed by Plaintiffs in Error, and was sufficient to entitle Plaintiffs in Error to have such issue submitted to the jury.

Second Ground for Rehearing.

The Court erred in refusing to sustain the Tenth Assignment of Error (Rec., p. 887), wherein Plaintiffs in Error complained of the refusal of the Trial Court to give Plaintiffs' in Error Special Charge No. 8 (Rec., p. 768), as follows:

"You are instructed that in reaching a conclusion as to whether Charles A. Felder did or did not, on June 10, 1839, make, execute

and deliver to William A. Daniels a deed conveying to the said William A. Daniels the Charles A. Felder league of land in Hardin County, Texas, a part of which is in controversy herein, which deed defendants claim to have been so made, executed and delivered, you may consider any claim of title, if any, occupancy, use and enjoyment, if any, of and on the land in controversy by the defendants, and those under whom defendants claim, along with the fact that a deed purporting to have been executed by Charles Felder to William A. Daniels, and purporting to have been acknowledged by Charles A. Felder, was spread upon the Deed Record Book of Menard County, Texas, on the 23rd day of February, 1842, which record is in evidence before you, together with any other facts in evidence before you which may bear upon said issue."

Because plaintiffs in Error (defendants below) were seeking to establish the fact that the said Charles A. Felder had, at or about the date named, made, executed and delivered to the said William A. Daniels a deed conveying the Charles A. Felder league in Hardin County, Texas, a part of which is involved in this suit, and the Court had admitted in evidence as a circumstance in support of said contention the original Deed Record Book of Menard County, showing spread thereon on February 23, 1842, and remaining continuously thereon since, such a deed, and the undisputed and uncontroverted evidence showed that Plaintiffs in Error, claiming under said deed, and their predecessors in title thereunder, had since said time continuously, openly and notoriously claimed said land, with acts of ownership thereof, by the cutting of timber, taking of sand, rendition and payment of taxes, claiming under general warranty deeds down to the filing of this suit and thereafter, and the undisputed evidence showed non-claim upon the part of Defendants in Error and those under whom they claimed, no payment of taxes, no rendition for taxes, and such evidence was sufficient to, and did, raise the issue of the execution of said deed, and was sufficient to entitle Plaintiffs in Error to have said issue submitted to the jury.

Third Ground for Rehearing.

The Court erred in finding and concluding that the deed from Charles A. Felder to John A. Veatch, dated June 18, 1839, under which Defendants in Error claimed (and which was filed for record in Liberty County, October 21, 1939), was filed for record prior to the recording of the deed from Charles A. Felder to William A. Daniels, dated June 10, 1839, in said county, under which Plaintiff in Error claimed, because the property described (Charles A. Felder league) in said deeds was at the date of the execution thereof in Liberty County, Texas, and it was agreed upon the trial below that the Records of Liberty County at that date had been wholly destroyed and the Clerk of the Court at that time was dead, and there is no evidence whatsoever in the record that the deed from Felder to Daniels was not filed for record in Liberty County before and prior to the date the deed from Felder to Veatch was so filed and prior to the execution of the deed from Felder to Veatch.

Fourth Ground for Rehearing.

The Court erred in refusing to sustain the Seventh Assignment of Error (Rec., p. 883), wherein Plaintiffs in Error complained of the refusal of the Trial Court to give Plaintiffs' in Error Special Charge No. 5 (Rec., p. 764), as follows:

"You are instructed that if you shall find from the evidence, that is such facts or circumstances as the Court has permitted to go before you, that a deed from the said Charles A. Felder to the said William A. Daniels, dated June 10, 1839, conveying the Charles A. Felder league in Hardin County, Texas, had been executed and delivered, and had been presented to the Clerk of the County Court of Liberty County, Texas, for record, at or prior to the time the deed from the said Charles A. Felder to John A. Veatch was executed, if it was executed, then you are instructed that the said John A. Veatch had constructive notice of the execution of the prior deed by the said Felder to the said Daniels, if you find that such a deed had been so executed, and that by the execution of the deed from the said Felder to the said Veatch, if the same was executed by the said Felder, no title passed to the said John A. Veatch, and in such event, if you so find the fact to be, your verdict must be in favor of all the defendants herein, as against both the plaintiffs and interveners."

Because the evidence showed that the property in question, at the date of the execution of the deed from Felder to Daniels (under which Plaintiffs in Error claimed), and the deed from Felder to Veatch (under which Defendants in Error claimed), was in Liberty County, Texas, and there was an agreement upon the trial in the Court below, that all the Records of Liberty County had been wholly destroyed and that the Clerk of the County Court of Liberty County, who was the custodian of such Records during such period, was dead; and the evidence further showed that the place of the execution of the deed from Felder to Daniels, to wit, Jasper County, Texas, was only 85 miles from the County Seat of Liberty County; and the evidence further showed long claim and acts of ownership by Plaintiffs in Error, and by their predecessors in title under said deed from Felder to Daniels, and non-claim by Defendants in Error, and those under whom they claimed under said deed from Felder to Veatch. All of which raised the issue of whether or not the deed from Felder to Daniels was recorded in Liberty County prior to the execution of the deed from Felder to Veatch, and such evidence was sufficient to entitle Plaintiffs in Error to have said issue submitted to and passed upon by the jury.

Fifth Ground for Rehearing.

The Court erred in refusing to sustain the Fifth Assignment of Error (Rec., p. 876), wherein Plaintiffs in Error complained of the refusal of the Trial Court to give Plaintiffs' in Error Special Charge No. 10 (Rec., pp. 770-771), as follows:

"You are instructed that if you shall find that on the 10th day

of June, 1839, Charles A. Felder, to whom the Felder league of land in Hardin County, Texas, was originally granted, made and executed a deed whereby the said Felder on that date conveyed to one William A. Daniels the said Felder league of land, neither the plaintiffs nor the interveners can recover any portion of the land as claimed by them, unless you shall believe from the facts and circumstances before you that the deed which has been read in evidence before you by the plaintiffs, purporting to have been executed by the said Charles A. Felder on the 18th day of June, 1839, in favor of one John A. Veatch, was in fact made and executed by the said Charles A. Felder to the said John A. Veatch, and unless you shall also further find and believe from the facts and circumstances in evidence before you that the said John A. Veatch did not have notice or knowledge at the time he took said deed from said Felder, if he did, of the prior deed made by the said Felder to the said William A. Daniels, if you find it was so made, executed and delivered, and unless you further find that John A. Veatch paid to the said Felder for said land a valuable consideration."

Because the law is clear that if the said John A. Veatch, at the time of the execution of the deed to him by Charles A. Felder, June 18, 1839, had notice of the prior and older deed from Charles A. Felder to William A. Daniels, dated June 10, 1839, or if the said John A. Veatch did not pay value for said property, then such senior deed to Daniels and those claiming under it must prevail; and because the undisputed and uncontroverted evidence showed that Plaintiffs in Error, claiming under said Daniels' deed by regular chain of general warranty deeds, and the predecessors in title of Plaintiffs in Error, have for more than seventy years openly and notoriously claimed the property involved in this suit, rendered and paid taxes thereon, and continuously exercised acts of ownership thereof by cutting timber, taking sand, protecting from trespassers, etc., with no acts of ownership, rendition or payment of taxes by Defendants in Error. All of which was sufficient, under the decisions of the higher Courts in Texas and under the decision of this Court, to raise the issue of whether or not the said John A. Veatch purchased with notice of said senior deed and paid value; and Plaintiffs in error were entitled to have such issue, and the evidence was sufficient to entitle them to have such issue, submitted to the jury.

Sixth Ground for Rehearing.

The Court erred in refusing to sustain the Eleventh Assignment of Error (Rec., p. 888), wherein Plaintiffs in Error complained of the refusal of the Trial Court to give Plaintiffs' in Error Special Charge No. 11 (Rec., pp. 771-772), as follows:

"You are instructed that if you shall find that the purported deed from the said Charles A. Felder to the said John A. Veatch was in fact executed by the said Charles A. Felder to the said John A. Veatch, then in determining the issue of whether or not the said John A. Veatch paid to the said Charles A. Felder a valuable consideration for the said property, and whether the said John A.

Veatch had notice of said deed from Charles A. Felder to the said William A. Daniels; if you find that such a deed was so executed, you may consider the claim of ownership asserted to the Felder league of land by the defendants and those under whom they claim herein, if any, and their rendition of said land, for taxes, if any, and their payment of taxes thereon, if any, and the exercise of such acts of ownership as you shall find from the evidence that the defendants herein and those under whom they claim exercised, if any, claiming under the deed to the said William A. Daniels, if any, and also the course of dealing; that is to say, the sales and transfers of said land, if any, among the defendants' predecessors in title."

Because the law is clear that if the said John A. Veatch, at the time of the execution of the deed to him by Charles A. Felder, June 18, 1839, had notice of the prior and older deed from Charles A. Felder to William A. Daniels, dated June 10, 1839, or if the said John A. Veatch did not pay value for said property, then such senior deed to Daniels and those claiming under it must prevail; and because the undisputed and uncontroverted evidence showed that Plaintiffs in Error, claiming under said Daniels' deed by regular chain of general warranty deeds, and the predecessors in title of Plaintiffs in Error, have for more than seventy years openly and notoriously claimed the property involved in this suit, rendered and paid taxes thereon, and continuously exercised acts of ownership thereof by cutting timber, taking sand, protecting from trespassers, etc., with no acts of ownership, rendition or payment of taxes by Defendants in Error. All of which was sufficient under the decisions of the higher Courts in Texas and under the decision of this Court, to raise the issue of whether or not the said John A. Veatch purchased with notice of said senior deed and paid value; and Plaintiffs in Error were entitled to have such issue, and the evidence was sufficient to entitle them to have such issue, submitted to the jury.

Seventh Ground for Rehearing.

The Court erred in refusing to sustain Assignment of Error One F (Rec., p. 867), wherein Plaintiffs in Error complained of the refusal of the Trial Court to instruct the jury to render a verdict for Plaintiffs in Error, for the reasons given in said assignment, as follows:

"F. Because even if the purported deed from Charles A. Felder to John A. Veatch was in fact made, executed and delivered, as claimed by plaintiffs and interveners, that defendants' claim under a deed from Charles A. Felder to William A. Daniels, which is a prior deed and an older deed out of the said Charles A. Felder, and was made, executed and delivered by the said Charles A. Felder previous to the date and previous to the execution of the purported deed from Charles A. Felder to John A. Veatch, and the evidence in this case clearly shows that the said John A. Veatch was not the bona fide, innocent purchaser for value of the Charles A. Felder league of land, without notice of the older deed from Charles A. Felder to William A. Daniels, but on the contrary, the evidence in

this case clearly shows that the said John A. Veatch did have notice of said deed from Charles A. Felder to William A. Daniels, and that he was not an innocent purchaser for value without notice thereof, and the evidence in this case of all such facts would require the Court to instruct the jury to return a verdict in favor of the defendants, and would require the Court to enter judgment in favor of defendants."

Because, under decisions of the higher Courts of the State of Texas and of this Court, it is held that while under the Act of 1836 of the Congress of Texas the burden of proof is upon the one holding under a senior deed to show that one holding the same property under a junior deed is not a purchaser for value, or purchased with notice of such senior deed, such burden of proof is and may be fully discharged by proof of long claim under such senior deed, with rendition and payment of taxes and other acts of ownership of that character, and non-claim upon the part of the one holding under the junior deed; and because the undisputed and uncontroverted evidence showed that Plaintiffs in Error have for more than seventy years openly and notoriously claimed the property involved in this suit, rendered and paid taxes thereon, and continuously exercised acts of ownership thereof by cutting timber, taking sand, protecting from trespassers, etc., with no acts of ownership, rendition or payment of taxes by Defendants in Error. And such evidence supported and demanded a charge to the jury to render a verdict in favor of Plaintiffs in Error.

Eighth Ground for Rehearing.

The Court erred in refusing to sustain the Twenty-seventh Assignment of Error, wherein Plaintiffs in Error complained as follows:

"That even though plaintiffs and interveners were entitled to judgment for the land in controversy herein, the Court erred to the prejudice of these defendants in rendering judgment in favor of plaintiffs and interveners in the sum of Twelve Hundred and Eighty-six Dollars for damages, because it clearly appeared from the evidence in this case that the only damages for which a recovery could be had against these defendants was for sand removed from the tract of land in controversy, and it clearly appears from the testimony of T. E. Danziger, Secretary of the Texas Builders Supply Company, that there were removed, from September 1, 1910, to September 1, 1912, during a period which was not barred by the statute of limitation, nine hundred and five cars of sand, of the value of Twelve Hundred and Eighty-six Dollars; and it further clearly appears from the evidence herein that defendants are not liable for any other damages whatsoever to said tract of land, other than the removal of said nine hundred and five cars of sand. And it further clearly appears that if plaintiffs and interveners own any interest in said tract of land, to wit, the Charles A. Felder league in Hardin County, Texas, or any part thereof, such interest is an undivided interest, and that persons, other than plaintiffs and in-

terveners, and who are not parties to this suit, own the other undivided interests therein and own other undivided interests in and to the portion of said Felder league involved in this suit, and that persons, other than plaintiffs and interveners, are tenants in common with said plaintiffs and interveners, in and to the land involved in this suit, and that such other persons are not parties to this suit and are not in any way bound by the judgment in favor of plaintiffs and interveners against defendants for such damages, and are not in any way estopped from prosecuting a suit against these defendants for their portion of such damages, because one tenant in common can not, under the law, recover damages for another tenant in common, not a party to the suit, but can only recover such portion of such damages to which the tenant in common bringing the suit may be entitled."

Ninth Ground for Rehearing.

The Court erred in finding and concluding that the evidence upon the trial in the Court below was not sufficient to raise the issue of forgery of the alleged deed from Charles A. Felder to John A. Veatch, under which Defendants in Error claimed, and erred in holding that Plaintiffs in Error were not entitled to have said issue submitted to the jury, and erred in refusing to sustain Plaintiffs' in Error Second, Third and Sixth Assignments of Error, because the evidence clearly was sufficient to raise the issue of forgery, and to raise such issue of the forgery of said deed and the execution of said deed, and to require the submission of said issue to the jury.

Tenth Ground for Rehearing.

The Court erred in finding and concluding that the evidence offered on the trial in the Court below was not sufficient to raise the issue under the ten-year statute of limitation, and not sufficient to entitle Plaintiffs in Error to have said issue submitted to the jury for determination, because the evidence is sufficient to raise said issue and sufficient to entitle Plaintiffs in Error to have, and sufficient to require, said issue to be submitted to the jury for its determination.

Eleventh Ground for Rehearing.

The Court erred in finding and concluding that the verdict of the jury against the Plaintiffs in Error, under the five-year statute of limitation, is supported by the evidence, because the evidence is wholly insufficient to support the verdict, and such verdict is contrary to such evidence.

Twelfth Ground for Rehearing.

The Court erred in finding and concluding that the evidence offered on the trial in the Court below was not sufficient to raise

the issue under the three-year statute of limitation, and not sufficient to entitle Plaintiffs in Error to have said issue submitted to the jury for determination, because the evidence is sufficient to raise said issue and sufficient to entitle Plaintiffs in Error to have, and sufficient to require, said issue to be submitted to the jury for its determination.

Thirteenth Ground for Rehearing.

The Court erred in holding that the certified copy of the deed from Charles A. Felder to William A. Daniels, from the Records of Menard County, was not admissible in evidence, and in refusing to sustain Plaintiffs' in Error Eighty-second Assignment of Error (Rec., p. 957), and Eighty-fifth Assignment of Error (Rec., p. 958).

Wherefore, Plaintiffs in Error pray that this cause be re-examined by your Honors, and that this, their Motion for Rehearing, be granted, and that the judgment of the Court below be reversed and the cause be remanded for new trial.

Respectfully submitted,

H. O. HEAD,
OSWALD S. PARKER,
T. M. KENNERLY,

Attorneys for Plaintiffs in Error.

H. O. HEAD,
PARKER & KENNERLY,
Of Counsel.

I, T. M. Kennerly, one of the attorneys for Plaintiffs in Error herein, do hereby certify that in my opinion the above and foregoing motion is well founded in point of law, and should be granted.

T. M. KENNERLY,
Attorney for Plaintiffs in Error.

Order Denying Rehearing.

Extract from the Minutes of November 19, 1915.

No. 2748.

THE HOUSTON OIL COMPANY OF TEXAS et al.
versus
CORNELIA G. GOODRICH et al.

Ordered that the petition for rehearing, filed in this cause, be and the same is hereby, denied.

Order to Transmit Exhibits in the Original.

Extract from the Minutes of February 14, 1916.

No. 2748.

HOUSTON OIL COMPANY OF TEXAS et al.

versus

CORNELIA G. GOODRICH et al.

On motion of counsel for plaintiffs in error, it is ordered by the Court that the fifteen exhibits forwarded to this Court with the transcript of the record herein from the District Court of the United States for the Eastern District of Texas, be transmitted to the Supreme Court of the United States with the transcript of the record on return to the Writ of Certiorari herein.

Clerk's Certificate.

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 972 to 1026 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2748, wherein Houston Oil Company of Texas, et al., are plaintiffs in error, and Cornelia G. Goodrich, et al., are defendants in error, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 971 are identical with the printed record upon which said cause was heard and decided in the said Circuit Court of Appeals.

I further certify that the fifteen exhibits which were forwarded to this Court in the original are ordered to be transmitted to the Supreme Court of the United States, as per motion and order copied at page 1025 of this record.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 16th day of February, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,

Clerk of the United States Circuit Court of Appeals.

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company are plaintiffs in error, and Cornelia G. Goodrich et al. are defendants in error, No. 2748, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Eastern District of Texas, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of February, in the year of our Lord one thousand nine hundred and sixteen.

JAMES D. MAHER,

Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 25,067. Supreme Court of the United States, October Term, 1915. No. 784. The Houston Oil Company of Texas et al. vs. Cornelia G. Goodrich et al. Writ of Certiorari. 2748. U. S. Circuit Court of Appeals. Filed Feb. 7, 1916. Frank H. Mortimer, Clerk.

United States Circuit Court of Appeals, Fifth Circuit.

No. 2748.

HOUSTON OIL COMPANY OF TEXAS et al., Plaintiffs in Error,
vs.
CORNELIA G. GOODRICH et al., Defendants in Error.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that in pursuance of the command of the foregoing writ of error, I attach hereto a transcript of the record of the proceedings of this Court in the within entitled cause, which said transcript is correct and complete as the same appeared in this Court, together with original exhibits forwarded to this Court therewith, and which are now transmitted to the Supreme Court of the United States, as ordered by this Court.

Witness my official signature, and the seal of the United States

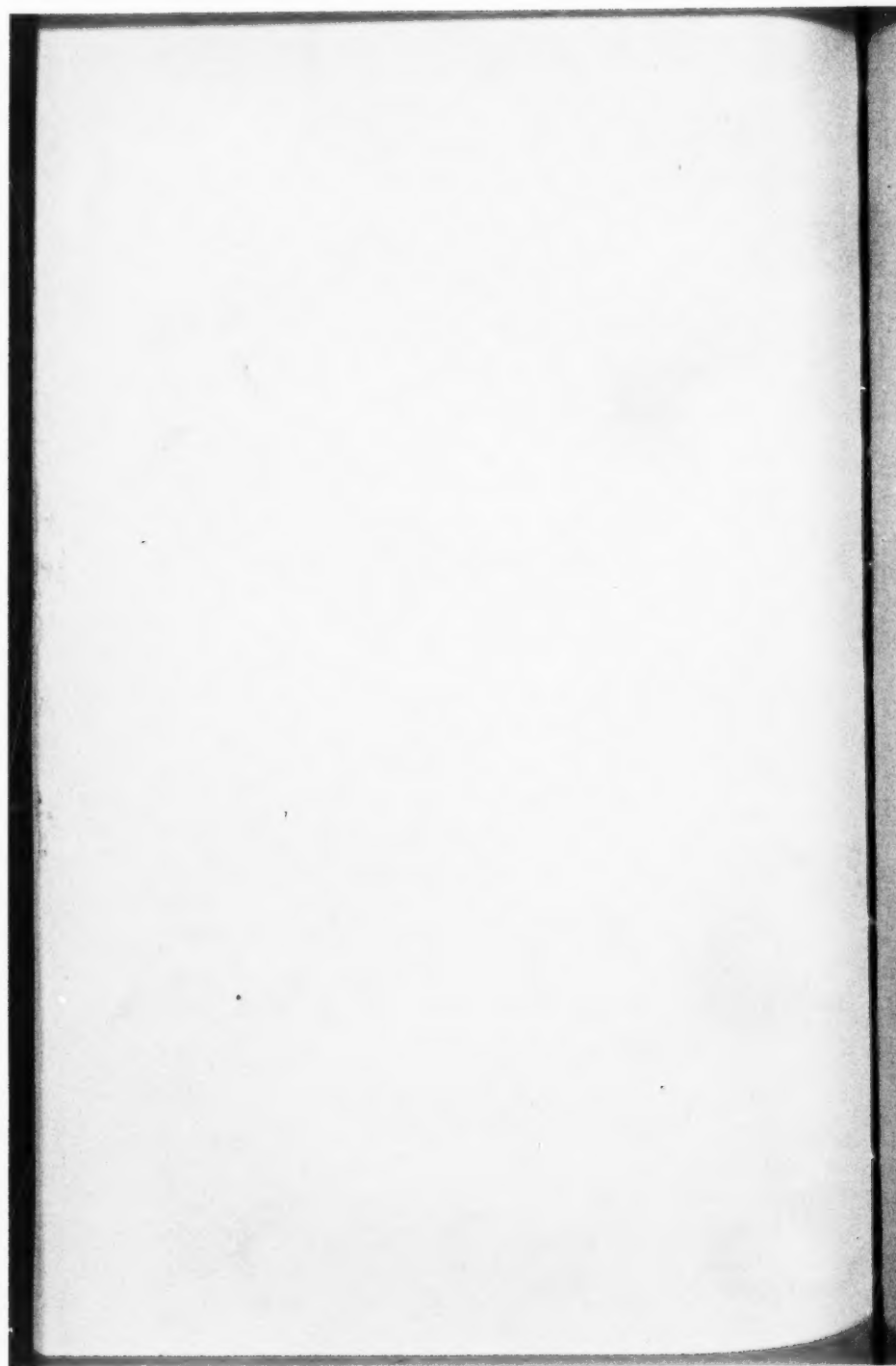
Circuit Court of Appeals, at the City of New Orleans, Louisiana, in said Circuit, this 16th day of February, A. D. 1916.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
*Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.*

[Endorsed:] 784/25067. No. 2748. United States Circuit Court of Appeals for the Fifth Circuit. Houston Oil Company of Texas et al., Plaintiffs in Error, vs. Cornelia G. Goodrich et al., Defendants in Error. Writ of Certiorari and Return.

[Endorsed:] File No. 25,067. Supreme Court U. S., October term, 1915. Term No. 784. The Houston Oil Company of Texas et al., Petitioners, vs. Cornelia G. Goodrich et al. Writ of certiorari and return. Filed February 19, 1916.



Office Supreme Court, U. S.

FILED

MAR 3 1917

No. 3

78

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS

ET AL.,

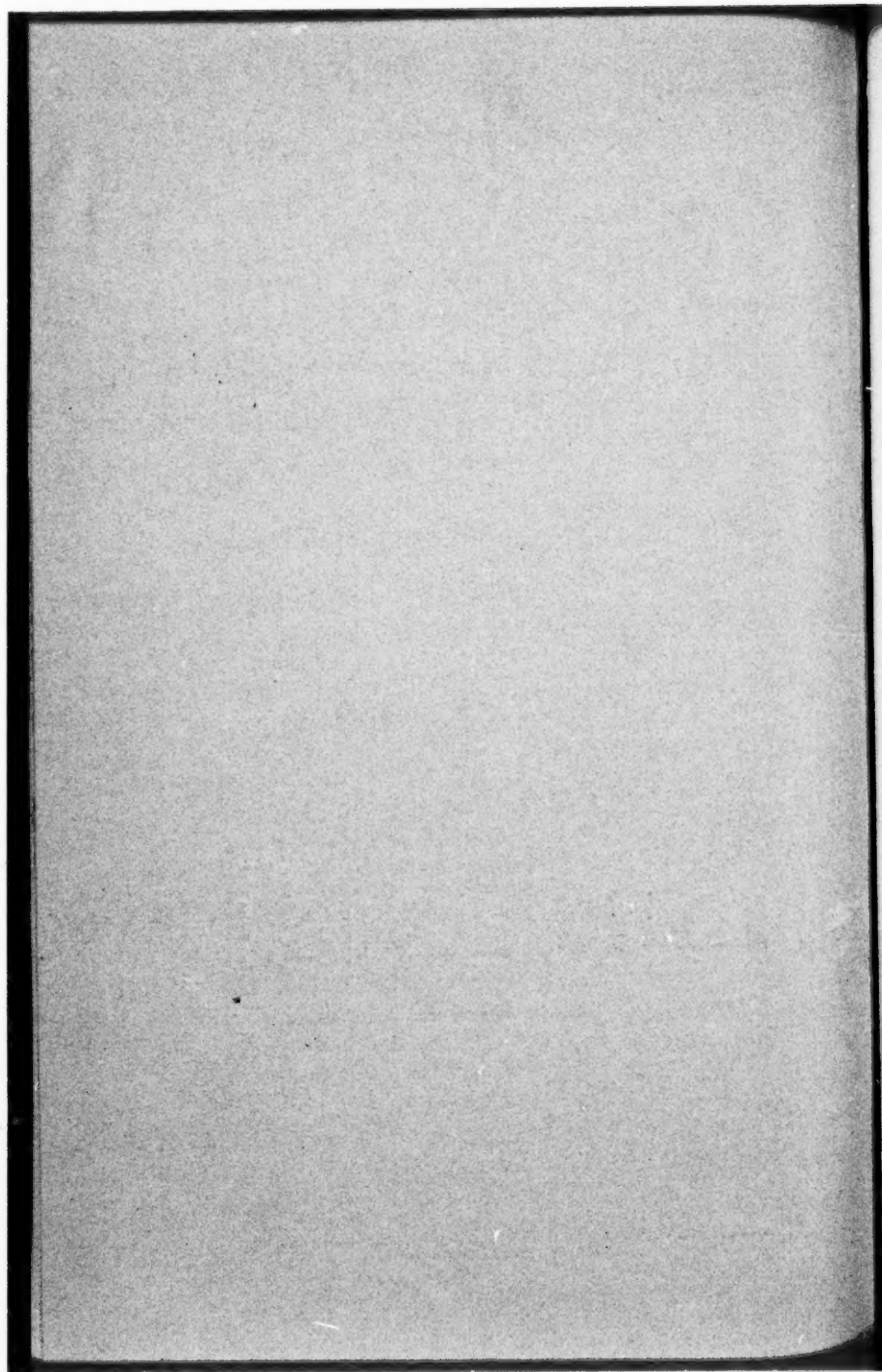
Petitioners,

VS.

CORNELIA G. GOODRICH ET AL.,

Respondents

Motion of Petitioners for rule against Respondents for Contempt of Court, in appropriating to their own use the subject-matter of this litigation in violation of the order of supersedeas, and in destroying and removing the chief value thereof since this Court's jurisdiction attached, and for such other appropriate relief as will prevent Respondents from more completely forestalling the effectiveness of final judgment herein.



INDEX

	PAGES
Motion	1- 4
Brief in support of motion.....	5-23
Affidavits and exhibits in support of motion.....	24-63

SUBJECT INDEX TO MOTION.

	PAGE
Motion by petitioners against respondents for rule to require respondents to show cause why they should not be held in contempt of court:	
For cutting, removing and appropriating 8,493,-995 feet of pine timber from the land in controversy, in violation of supersedeas and since the granting of the writ of <i>certiorari</i> in this cause	2
For burning house on premises in controversy, in violation of supersedeas, which house was valuable evidence in this cause.....	2
For cutting during 1913 and 1914, during the pendency of prosecution of the first writ of error in this cause, 4,317,464 feet of pine timber from the land in controversy.....	2
Certified copies showing granting, issuance, and service of writ of error and supersedeas, in accordance with Section 1007 of the United States Statutes (Exhibits B, C and D).....	25, 30, 32
Affidavits showing cutting and appropriating of timber in violation of supersedeas, etc., and burning of house:	
W. A. McClelland	48
Eugene McMahon and W. A. McClelland.....	55
Eugene McMahon, W. A. McClelland and H. A. Woods	51

Affidavits and exhibits showing organization and chartering of Village Mills Company by parties to suit for purpose of cutting, removing, and appropriating timber:	
Affidavit Thomas M. Kennerly.....	34
Certified Copy of Charter of Village Mills Co.....	43
Notice to parties and service of motion:	
Notice on motion	57
Proof of service of motion, affidavits, etc., in support thereof, and brief	60
Additional proof of service of motion, affidavits and exhibits in support thereof, and brief.....	62

SUBJECT INDEX TO BRIEF.

	PAGE
Presentation of proposition that writ of error and supersedeas were duly granted, issued, and served in this case.....	13
Presentation of proposition that respondents are in contempt of this court in having cut, removed, and appropriated 8,493,995 feet of pine timber from the tract of land in controversy since granting and service of supersedeas and since granting of <i>certiorari</i> by this court in this cause.....	14
Presentation of proposition that the burning of the house situated on land in suit, which house was valuable evidence for petitioners, since the granting and service of said supersedeas and granting of writ of <i>certiorari</i> , is contempt of this court	17
Presentation of proposition that destruction of the subject-matter of the litigation, by cutting, removing, and appropriating 4,317,464 feet of pine timber in 1913 and 1914, though not then in violation of supersedeas, is contempt of this court.....	17
Presentation of proposition that the attorneys for those respondents who are parties to this suit are likewise in contempt of court for having advised, aided, and abetted in the cutting, removal and appropriation of said timber.....	18

Presentation of proposition that J. Ben Hooks and Wiley J. Bracken are likewise in contempt of this court for having, as officers of the Village Mills Company, aided and abetted the other respondents in cutting, removing, and appropriating said timber 19

Presentation of the proposition that for the preservation of the land involved in this suit and the improvements, etc., thereon this court will restore same to the possession of the Houston Oil Company of Texas, in whose possession it was prior to the institution of this suit, and will enjoin respondents and each of them from going thereon or interfering in any way therewith..... 19

LIST OF AUTHORITIES CITED

	CITED ON PAGE
Anderson v. Comptois (109 Fed., 971).....	18
Bank of U. S. v. Bank of Washington (31 U. S., 8; 6 Peters, 8; 8 Law. Ed., 299).....	20
Castle v. Duncan [2 Serg. & R. (Pa.), 57].....	20
Foster v. Kansas (112 U. S., 201).....	14
G. C. & S. F. R'y Co. v. Ft. W. & N. O. R'y Co. (68 Tex., 98)	15, 16
Galpin v. Page (85 U. S., 250; 21 Law. Ed., 250).....	20
Gregg v. Forsyth (69 U. S., 56; 17 Law. Ed., 782).....	20
Hinchman v. Ripinsky (202 Fed., 625).....	20
Houston Oil Company of Texas v. Village Mills Company	21, 22
Kellogg, <i>ex parte</i> (64 Cal., 343; 30 Pac., 1030).....	15
McKenzie, <i>In re</i> (180 U. S., 536).....	13, 14
Merrimac River Sav. Bank v. Clay Center (219 U. S., 527)	14
Morris and Johnson, <i>ex parte</i> (76 U. S., 605; 19 Law. Ed., 799)	20
Northwestern Fuel Co. v. Brock (139 U. S., 216; 25 Law. Ed., 151)	18

People's Cemetery Ass'n v. Oakland Cemetery Co. (60 S. W., 679).....	15
Penn. R. R. Co. v. Nat'l Docks and J. N. R. R. Co. (54 N. J. Eq., 654; 35 Atl., 433).....	15
Peticolas v. Carpenter (53 Tex., 23).....	20
Perry v. Tupper (71 N. Car., 385).....	20
Robinson v. Alabama (67 Fed., 189).....	20
Reynolds v. Harris (14 Cal., 667).....	20
San Antonio St. R'y Co. v. State (38 S. W., 54).....	15
State, <i>ex rel.</i> , v. Pittsburg (80 Kan., 710; 25 L. R. A., N. S., 226; 104 Pac., 847).....	15
State, <i>ex rel.</i> Morse, v. District Court (29 Mont., 230; 74 Pac., 412).....	15
Stenard v. Brownlow [3 Munf. (Va.), 229].....	20
Tornanses v. Melsing (106 Fed., 775).....	14
U. S. Compiled Statutes, Section 1007.....	13
United States v. Shipp (203 U. S., 533).....	14
U. S. Compiled Statutes, Section 1239 (Sec. 262 of Judicial Code)	20
Wilson v. North Carolina (169 U. S., 586).....	14
Wartman v. Wartman, Taney, 362, Fed. Cas. No. 17210	14

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS

ET AL.,

vs.

Petitioners,

CORNELIA G. GOODRICH ET AL.,

Repsondents.

No. 335

MOTION

Come now the Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, and respectfully move the court to grant and issue a rule against:

Cornelia G. Goodrich, a *feme sole*, Edward L. Montgomery, Jr., Margaret W. Montgomery, a *feme sole*, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, residents of the Southern Judicial District of the State of New York;

Fannie M. Allen, a *feme sole*, Mary M. Steadman, a *feme sole*, Ophelia M. Cox and husband, Louis L. Cox,

residents of the Eastern Judicial District of the State of Kentucky;

William D. Gordon, Thomas J. Baten, Eugene E. East-erling, Harrison M. Whitaker, J. Ben Hooks, Wiley J. Bracken, the Village Mills Company, a corporation, of which said J. Ben Hooks is President, said Thomas J. Baten is Vice-President, and said Wiley J. Bracken is Secretary, all residents of the Eastern Judicial District of the State of Texas:

(1) To show cause why they and each of them should not be adjudged in contempt of this court, and punished therefor, for violating the order of supersedeas herein and destroying almost wholly the subject-matter of litigation, by cutting, removing, and appropriating the pine timber from the 2578 acres of land involved in this suit, and willfully destroying part of the improvements thereon, which improvements were valuable evidence on behalf of petitioners herein.

(2) To show cause why they and each of them should not be, in order that the subject-matter of this litigation may be preserved, required to restore to the possession of the Houston Oil Company of Texas, pending final judgment, the 2578-acre tract of land and all improvements thereon involved in this suit, which were in the possession of said Oil Company at the time of the institution of this suit, and why said persons should not be restrained and enjoined from going thereon or in any manner using or interfering therewith.

(3) Or, why this court should not direct the United States Marshal for the Eastern District of Texas, or other proper person, to take possession of said tract of land and improvements thereon, and hold and preserve same pending final judgment herein, and why said per-

sons should not be restrained and enjoined from going thereon or in any manner using or interfering therewith.

(4) And why this court should not grant petitioners any other appropriate relief, for which petitioners pray, by holding respondents in contempt of this court for, in part, appropriating the subject-matter of the litigation, and, in part, destroying the subject-matter of the litigation, and punishing them with suitable punishment, and making such orders as may be found necessary and proper to preserve the subject-matter of the litigation pending final judgment.

In support of said motion, petitioners refer to, and tender herewith, as shown by appendix:

(1) The proceedings shown by the printed record in this cause, to which suitable reference is made in brief in support hereof.

(2) Certified copies (Exhibits A, B, and C) from the office of the Clerk of the District Court and the office of the Clerk of the Circuit Court of Appeals, showing issuance and service of writ of error and order for supersedeas under Article 1007 of the United States Statutes.

(3) Certified copy (Exhibit D) of charter of Village Mills Company, showing organization by said persons and the chartering of Village Mills Company with its principal office upon the tract of land involved in this suit.

(4) Affidavits of H. A. Woods, Eugene McMahon, W. A. McClelland and T. M. Kennerly, showing the cutting, removal, and appropriation by respondents of all the pine timber (12,811,459 feet) on said tract of land since the institution of this suit, and the cutting, removal, and appropriation by respondents, since the granting and service of said supersedeas, of 8,493,995 feet thereof, substan-

tially all of which was since the granting by this court of writ of *certiorari* herein, and also showing proceedings in this cause, purpose of organization of Village Mills Company, etc.

Respectfully submitted,

WILLIAM L. MARBURY,

THOMAS M. KENNERLY,

*Attorneys for Houston Oil Company
of Texas, Kirby Lumber Company,
and Maryland Trust Company, Pe-
titioners.*

HEAD, DILLARD, SMITH, MAXEY & HEAD,
MARBURY, GOSNELL & WILLIAMS,
PARKER & KENNERLY,
Of Counsel.

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS
ET AL.,

vs.

Petitioners,

CORNELIA G. GOODRICH ET AL.,
Respondents.

No. 335

BRIEF FOR PETITIONERS ON PENDING MOTION

Statement of the Case.

At the time of the institution of this suit (1911) the 2578 acres of land involved herein had standing on 1934 acres thereof 36,831 *pine trees*, aggregating 12,811,459 feet of *pine timber*. All have been cut, removed, and appropriated by respondents since the filing of this suit.

Of said *pine trees*, 24,393, aggregating 8,493,995 feet of *pine timber*, have been cut, removed and appropriated by respondents during the year 1916, in violation of super-sedeas granted and served February 3, 1915, upon petitioners' prosecution of writ of error in this cause, and substantially all of said 24,393 *pine trees* have been cut,

removed, and appropriated by respondents *since the granting by this court of its writ of certiorari herein.*

A house, known as the W. T. Carroll house, and shown by photograph No. 1, sent up with the record in this case, which was perhaps the most, certainly one of the most, valuable pieces of evidence offered in the trial court to sustain petitioners' title, *has been burned by respondents since the granting and service of said supersedeas, and in violation thereof, and, it is believed and charged, since this court granted its writ of certiorari herein.*

The motion is for a rule against respondents to require them to show cause why they should not be held in contempt of this court, and suitably punished for such contempt, and that, as a measure of preservation of the property involved in this suit, the premises in controversy be placed back in the possession of the Houston Oil Company of Texas, where they were at the time of the filing of this suit and for many years prior thereto, or, in the alternative, that same be placed in the possession and custody of an officer or other suitable person appointed by the court, and that respondents and each of them be enjoined and restrained from going thereon or in any manner interfering therewith pending final judgment in this cause. Or that other appropriate relief be granted, to the end that respondents be fittingly punished and the subject-matter of litigation be preserved.

History of Litigation:

Plaintiffs in this case filed this suit June 7, 1911 (Rec. p. 2), in United States District Court for Eastern District of Texas. Intervenor filed their intervention April 1, 1912. (Rec., p. 7.) The suit involves 2578 acres out of

the Charles A. Felder headright survey in Hardin County, Texas, in the Eastern Judicial District of Texas. (Rec., p. 8.) Defendants were (petitioners here): Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company. Maryland Trust Company is the mortgagee of the said Oil Company, and Kirby Lumber Company has a contract with said Oil Company to purchase the pine timber on said tract of land, at the price of five dollars per thousand feet. The record shows that the Houston Oil Company of Texas was in possession of the tract of land at the time of the filing of the suit, through its tenant and contractor, Texas Builders' Supply Company, which Supply Company was mining sand thereon, and had been for many years. The evidence further shows that said Oil Company and its vendors have been in actual possession of said tract of land for many years.

First Trial:

The first trial resulted in judgment for plaintiffs and intervenors, and against petitioners, judgment being dated December 2, 1912. (Rec., p. 26.)

Prosecution of Writ of Error from Judgment on First Trial.

Writ of error was prosecuted from the judgment of December 2, 1912, to the Circuit Court of Appeals, Fifth Circuit, and such judgment was reversed by that court February 10, 1914, and the cause remanded. (Rec., p. 36.) (213 Fed., 136.) Thereupon, plaintiffs and intervenors applied to this court for writ of *certiorari*, which was denied May 25, 1914. (234 U. S., 759.) Pending prosecu-

tion of the writ of error, petitioners filed, in the office of the County Clerk of Hardin County, in which county the land in controversy is situated, a *lis pendens* under the Texas statutes. (Exhibit A.)

While the writ of error from the judgment of December 2, 1912, was pending in the Circuit Court of Appeals (that judgment not having been superseded), plaintiffs and intervenors caused a writ of possession to issue out of the District Court (Rec., pp. 30 and 34), and the Houston Oil Company of Texas was ejected and plaintiffs and intervenors placed in possession. (Rec., p. 34.)

**Organization of Village Mills
Company by Respondents
(Plaintiffs and Intervenors
and Their Attorneys and J.
Ben Hooks and Wiley J.
Bracken):**

At the time this suit was filed, there was standing and growing upon said tract of land, as stated, 36,831 pine trees, aggregating 12,811,459 feet of pine timber, of the reasonable market value of five dollars per thousand feet and of the value of five dollars per thousand feet under the contract between the Houston Oil Company of Texas and Kirby Lumber Company. Respondents conspired among themselves to cut, remove, and appropriate said pine timber, and to escape liability therefor, organized a corporation known as the Village Mills Company. Thomas J. Baten, one of the attorneys for plaintiffs and intervenors in this cause, was one of the organizers and a stockholder, and has been a stockholder, director, and vice-president of the company since its organization (July 22, 1913). It is charged, and the circumstances surrounding the whole transaction prove said charge to be true,

that while the stock of the Village Mills Company is held in the name of J. Ben Hooks, Wiley J. Bracken, and Thomas J. Baten, same is, in fact, owned by plaintiffs and intervenors and their attorneys and said Hooks and said Bracken. The principal place of business of the Village Mills Company is fixed in the charter to be on the tract of land in suit. Its capital stock is only \$20,000, of which only one-half was paid in at time of organization.

Timber Cut by Village Mills Company in 1913 and 1914, Pending Prosecution of Writ of Error from Judgment of December 2, 1912:

During 1913 and 1914, Respondents, acting through the Village Mills Company, cut, removed, and appropriated the timber from approximately 900 acres of the land in suit, taking 12,438 trees, aggregating 4,317,464 feet of pine timber. (Affidavits of W. A. McClelland, H. A. Woods, Eugene McMahon.)

Efforts of Petitioners to Regain Possession of Tract of Land by Motion for Restitution:

At the first term of court after mandate of the Circuit Court of Appeals had been received reversing the judgment of December 2, 1912, and remanding the case for a new trial, petitioners applied to the District Court by motion to have respondents make restitution to them of the tract of land in controversy and all improvements thereon. (Rec., pp. 36-48.) The contention was that respondents had been placed in possession under the judgment of December 2, 1912, had used their possession to

cut, remove, and appropriate a large part of the subject-matter of the litigation (to wit, 4,317,464 feet of pine timber up to that time), and that petitioners were entitled as a matter of right to be put back in possession. The District Judge refused to rule upon such motion until after the case had been tried the second time, and after the judgment of December 1, 1914, had been entered. He then overruled motion for restitution. (Rec., p. 810.)

**Second Trial in District Court
and Prosecution of Writ of
Error from Judgment Ren-
dered on Second Trial:**

The case was tried the second time, resulting in judgment for those of the respondents who were plaintiffs and intervenors in the District Court. Petitioners' motion for new trial (Rec., p. 811) being overruled (Rec., p. 857), petitioners applied to the District Judge for writ of error and supersedeas (Rec., p. 862), and filed assignments of error (Rec., p. 864), and on February 3, 1915, the District Judge granted writ of error, same to act as supersedeas. (Rec., p. 960.) On February 3, 1915, petitioners presented their supersedeas bond, which was approved and filed. (Rec., p. 960.) On February 3, 1915, writ of error was issued, and on same date petitioners caused to be lodged in the office of the Clerk of the District Court, where the record remains for the use of those respondents who were plaintiffs and intervenors in that court, a copy of said writ of error, and same has since so remained on file. (Exhibits B, C and D to motion.) These proceedings were in accordance with Section 1007 of the United States statutes regarding supersedeas and service thereof. The citation in error was issued February 3, 1915, and served

on those respondents who were plaintiffs and intervenors in the court below on February 6, 1915, and copy of said citation in error was lodged in the Clerk's office for the use of said parties. All of said proceedings took place within sixty days, Sundays exclusive, of the date of the judgment (December 1, 1914).

**Proceedings in Circuit Court
of Appeals upon Prosecution
of Second Writ of Error:**

The Record was sent to the Circuit Court of Appeals and the cause briefed. Petitioners applied to the Circuit Court of Appeals for restitution of the premises (Rec., p. 972), alleging that the judgment under which respondents had been placed in possession had been reversed, and respondents were using their possession to destroy the subject-matter of the litigation, etc. The Circuit Court of Appeals affirmed the judgment of December 1, 1914, on October 4, 1915. (Rec., p. 988.) Petitioners filed motion for re-hearing (Rec., p. 991), which was overruled (Rec., p. 999), and petitioners applied to this court on January 8, 1916, and on January 31, 1916, were granted, writ of *certiorari*.

**Violation of Supersedeas by
Respondents:**

About the time (January 8, 1916) petitioners applied to this court for writ of certiorari, respondents again began cutting the timber from the tract of land in controversy. They had cut no timber from the date of the second judgment (December 1, 1914) up to about the time petitioners applied for such writ of certiorari, but from that time forward until all the timber was cut, and during

practically the entire year 1916, respondents continued from time to time to cut, remove, and appropriate said timber, and during said time cut and removed and appropriated 24,393 pine trees, or 8,493,995 feet of pine timber, of the value of five dollars per thousand feet.

**Burning House in Violation
of Supersedeas:**

In addition to their record title and claim running back for seventy-five years, connecting by regular chain of conveyances with the sovereignty of the soil, petitioners relied in the trial court upon the three, five, and ten years statutes of limitation. **One of the most important, if not the most important, pieces of evidence in support of said limitation title was a house known as the W. T. Carroll house (shown in photograph No. 1 sent up with the record in this case), built upon said property about 1901. This house has been destroyed by respondents since the granting of said supersedeas, and, it is believed, since the granting by this court of writ of certiorari.**

**Destruction of Subject-Matter
of Litigation:**

The subject-matter of this litigation has been virtually destroyed or appropriated by respondents. Affidavits attached to motion show that the 2578 acres of land, stripped of the pine timber thereon, is worth only about \$5200, and that the 12,811,349 feet of pine timber cut, removed and appropriated therefrom by respondents since the institution of this suit in the manner above set forth is of the reasonable value of five dollars per thousand feet, and is of the value of five dollars per thousand feet to the Houston Oil Company of Texas under its

stumpage contract with the Kirby Lumber Company. (Affidavits of W. A. McClelland, H. A. Woods, Eugene McMahon and T. M. Kennerly.)

Proposition No. One.

The writ of error granted petitioners to review the judgment of December 1, 1914, was a supersedeas, and was duly served by lodging a copy thereof for the use of respondents in the office of the Clerk of the District Court and giving the security required, on February 3, 1915, within sixty days (Sundays exclusive) after the rendering of such judgment.

Section 1007 of United States Compiled Statutes lays down the requirements to obtain supersedeas.

We take it that it will not be disputed that in suing out writ of error said section was strictly and literally complied with. The record and exhibits attached to motion fully show this.

While no supersedeas was actually *issued*, either by the Circuit Court of Appeals or by this court, as was said by this court in *In Re McKenzie* (180 U. S., 536):

"The court below had refused to grant an appeal, and, as an appeal lay, the Judge of the Circuit Court of Appeals had the power to award it and to grant a supersedeas, and if in his judgment a writ of supersedeas was required, under the particular circumstances, the order for it to issue was not in itself void, nor was the process void, issued under such order. Obedience to an order granting a supersedeas is as much required as to an order for a writ of supersedeas and to the writ thereupon issued. The essential point is that the order or decree below is superseded, and the parties affected must govern themselves accordingly."

The supersedeas is in effect when security is given and copy of writ of error lodged in the office of the Clerk of the District Court.

Foster v. Kansas, 112 U. S., 201.

Wilson v. North Carolina, 169 U. S., 586.

Proposition No. Two.

The cutting, removal, and appropriation by respondents of the timber (8,493,995 feet, worth \$5 per thousand feet) from 1034 acres of the land in suit, during 1916 and since the granting and service of said supersedeas, substantially all being since the granting by this court of writ of *certiorari* herein, is a contempt of this court, and will, we submit, be punished as such.

For a time the supersedeas was obeyed by respondents. No timber was cut during 1915. The case was decided by the Circuit Court of Appeals October 4, 1915, but no violation of supersedeas at once occurred. But upon or about the time of the filing of petition for *certiorari* in this court, the cutting began, and actively continued during 1916.

The circumstances clearly show an effort to defeat the jurisdiction of this court, appropriate the subject-matter of the litigation, and escape liability therefor.

Merrimac River Sav. Bank v. Clay Center, 219 U. S., 527.

United States v. Shipp, 203 U. S., 563.

In re McKenzie, 180 U. S., 536.

Foster v. Kansas, 112 U. S., 201.

Wilson v. North Carolina, 169 U. S., 586.

Tornanses v. Melsing, 106 Fed., 775.

Wartman v. Wartman, Taney 362, Fed. Case No. 17,210.

To the same effect are the Texas decisions, insofar as the question has been passed upon.

San Antonio St. R'y Co. v. State, 38 S. W., 54.

(Note: Writ of error was granted by the Supreme Court of Texas in this case, but in its opinion, 90 Tex., 521, the rule announced by the Court of Civil Appeals was not changed.)

G. C. & S. F. R'y Co. v. Ft. W. & N. O. R'y Co., 68 Tex., 98.

People's Cemetery Ass'n v. Oakland Cemetery Co., 60 S. W., 679.

The decisions of the courts of other States (many of them being cited with approval by Justice Lurton in the opinion in the Merrimac River case, 219 U. S., 527) are to the same effect.

State, *ex rel.* Morse, v. District Court, 29 Mon., 230 (74 Pac., 412).

Ex parte Kellogg, 64 Cal., 343 (30 Pac., 1030).

State, *ex rel.*, v. Pittsburg, 80 Kan., 710 (25 L. R. A., N. S., 226, 104 Pac., 847).

Penn. R. R. Co. v. Nat'l Docks and N. J. R. R. Co., 54 N. J. Eq., 654 (35 Atl., 433).

The opinion in the New Jersey case referred to (54 N. J. Eq., 654) clearly brings out the point we present. But more clearly still is it stated in the Merrimac River Bank case by Mr. Justice Lurton, where it is said:

"It does not necessarily follow that disobedience of such an injunction, intended only to preserve the *status quo* pending an appeal, may not be regarded as a contempt of the appellate jurisdiction of this court, which might be rendered nugatory by conduct calculated to remove the subject-matter of the appeal beyond its control, or by its destruction. This we need not decide, since, irrespective of any such injunction actually issued, *the willful removal beyond the reach of the court of the subject-matter of the litigation,*

or its destruction pending an appeal, from a decree praying, among other things, an injunction to prevent such removal or destruction until the right shall be determined, is, in and of itself, a contempt of the appellate jurisdiction of this court. That such conduct may be a violation of the injunction below affords no reason why it is not also a contempt of this court. Unless this be so, a reversal of the decree would be but a barren victory, since the very result would have been brought about by the lawless act of the defendants which it was the object of this suit to prevent. See *United States v. Shipp*, 203 U. S., 563, 51 L. Ed., 319, 27 Sup. Ct. Rep., 165, 8 A. & E. Ann. Cas., 265; *Richard v. Van Meter*, 2 Cranch., C. C., 214, Fed. Cas. No. 11,763; *Wartman v. Wartman*, Taney, 362, Fed. Cas. No. 17,210; *State, ex rel. Morse, v. District Ct.*, 29 Mont., 230, 74 Pac., 412; *Ex parte Kellogg*, 64 Cal., 343, 344, 30 Pac., 1030; *State, ex rel. Coleman, v. Pittsburg*, 80 Kan., 710, 712, 25 L. R. A. (N. S.), 226, 133 Am. St. Rep., 227, 104 Pac., 847.

"In *Wartman v. Wartman*, cited above, a case heard by Chief Justice Taney, on the circuit, the question was whether a defendant who had parted with an alleged trust fund in his custody pending an application for an order requiring him to pay the money into court was thereby in contempt. His act was held to be in contempt of the authority of the court, as a final decree would be idle and nugatory if, pending the litigation, he should be held at liberty to put the fund beyond the reach of the process of the court."

The Supreme Court of Texas, in the case of *Gulf, Colorado & Santa Fe Railway Co. v. The Fort Worth & New Orleans Railway Co.* (68 Texas, 98), heretofore cited, lays down this rule. That case was a suit by the Gulf, Colorado & Santa Fe Railway Co. to restrain the Fort Worth & New Orleans Railway Co. from constructing a railroad track across the Gulf, Colorado & Santa Fe Railway Com-

pany's railroad track, etc. After judgment in the trial court, and while the case was on appeal (supersedeas bond, etc., having been given), and in violation of injunction issued in said cause, the Fort Worth & New Orleans Railway Co. tore up and changed the track of the Gulf, Colorado & Santa Fe Railway Co., and constructed its own track across same. The court, in disposing of a motion for contempt against said Fort Worth & New Orleans Railway Co., says:

"Counsel for the complainant has intimated that only such punishment should be inflicted as the court may deem sufficient to secure obedience to its orders. This cause will therefore be dismissed for want of prosecution against the respondents not served. A fine of ten dollars will be assessed against the respondent company, and a fine of one dollar each against the other respondents who have been cited and have answered. *It will also be ordered that the respondent company, within sixty days from this date, restore complainant's track and right-of-way to their existing condition at the time the appeal from the judgment of the court below was perfected.*"

Proposition No. Three.

The burning of the house situated on the land in suit, which was a most valuable piece of evidence for the petitioners, is a contempt of this court.

We refer to the same authorities. It is clear the house was burned since the order of supersedeas, and reasonably clear that it was burned since this court granted its writ of *certiorari* herein.

Proposition No. Four.

The cutting, removal, and appropriation by respondents

of 4,317,464 feet of pine timber, of the value of \$5 per thousand feet, from said land in 1913 and 1914, pending the prosecution of the first writ of error from the first judgment in this cause, is a contempt of this court.

The destruction of the subject-matter of the litigation, whether in violation of a supersedeas or not, is a contempt. Same authorities.

Proposition No. Five.

Not only those respondents who are parties to this suit, but likewise their attorneys, Messrs. William D. Gordon, Thomas J. Baten, Harrison M. Whitaker, and Eugene E. Easterling, are in contempt of this court.

The Village Mills Company is a corporation organized by Thomas J. Baten, one of the attorneys in this case, and J. Ben Hooks, and Wiley J. Bracken. Mr. Baten is a stockholder, officer, and director therein, and has been since its organization. Petitioners claim that the stock of Village Mills Company is owned by the parties to this suit and their attorneys and said Hooks and said Bracken, and that the Village Mills Company was organized and used in order to escape liability. It will be noted that the value of the timber appropriated is more than three times the amount of the capital stock of Village Mills Company.

Anderson v. Comptois, 109 Fed., 971.

But even if it should appear that there is some other character of agreement between respondents, they cannot thereby escape.

Proposition No. Six.

J. Ben Hooks and Wiley J. Bracken, President and Secretary, respectively, of the Village Mills Company, are likewise in contempt of this court.

These persons, with full knowledge of all the facts, assisted the other respondents in organizing the Village Mills Company, and have actively assisted in cutting, removing and appropriating said timber.

Proposition No. Seven.

It clearly appearing that at the time of the institution of this suit the Houston Oil Company of Texas was in actual possession of the land in controversy, and was ejected therefrom and respondents placed in possession under process issued upon the judgment of December 2, 1912, which judgment was reversed and the cause remanded by the Circuit Court of Appeals on February 10, 1914, and petitioners herein thereupon applied by motion to the District Court for restitution of the premises, which motion was denied, and petitioners, upon the prosecution of writ of error from the judgment of December 1, 1914, applied by motion to the Circuit Court of Appeals for restitution of the premises, and it further clearly appearing that respondents have used and are using their possession to appropriate the timber thereon (the most valuable portion of the property in controversy), it is submitted that this court will, as a measure to protect and preserve the subject-matter of the litigation, and protect its jurisdiction, order restitution and require the land in controversy and all improvements on same restored to the Houston Oil Company of Texas as it was at and prior to

the institution of this suit, and enjoin and restrain respondents from going thereon or in any manner interfering therewith.

That petitioners were entitled to restitution of the premises upon the reversal of the judgment of December 1, 1912, and that their motion for restitution (Rec., p. 36) in the District Court should have been promptly granted by that court, will, we take it, not be seriously controverted. The authorities fully support this view.

Northwestern Fuel Co. v. Brock, 139 U. S., 216 (25 Law. Ed., 151).

Richard Gregg v. Robert Forsyth, 69 U. S., 56 (17 Law. Ed., 782).

Ex parte Morris and Johnson, 76 U. S., 605 (19 Law. Ed., 799).

Bank of U. S. v. Bank of Washington, 31 U. S., 8 (6 Peters, 8; 8 Law. Ed., 299).

Galpin v. Page, 85 U. S., 250 (21 Law. Ed., 250).

Robinson v. Alabama, 67 Fed., 189.

Hinchman v. Ripinsky, 202 Fed., 625.

Peticolas v. Carpenter, 53 Tex., 23.

Perry v. Tupper, 71 N. Car., 385.

Not only should the District Court have ordered restitution under the principles laid down in these authorities, but restitution should have been ordered by that court and by the Circuit Court of Appeals to protect their jurisdiction and preserve the subject-matter of the litigation. Likewise, this court should now, we submit, order restitution for the same reason.

Section 1239 of the United States Compiled Statutes (Sec. 262 of Judicial Code) is as follows:

“The Supreme Court and the District Courts shall have power to issue writs of *scire facias*. The Supreme Court, the Circuit Court of Appeals, and the

District Courts shall have power to issue all writs, not specifically provided for by statute, *which may be necessary for the exercise of their respective jurisdictions* and agreeable to the usages and principles of law."

This section, it seems, recognizes this character of procedure.

In the following cases the rule that the appellate court has authority and power to, and will, enforce restitution was recognized:

Reynolds v. Harris, 14 Cal., 667.

Stenard v. Brownlow, 3 Munf. (Va.), 229.

Castle v. Duncan, 2 Serg. & R. (Pa.), 57.

In a companion case to the case at bar, Houston Oil Company of Texas, Plaintiff in Error, v. Village Mills Company, Defendant in Error, pending on writ of error in the Supreme Court of Texas, No. 2963, that court recently stopped the defendant in error from invading the possession of the plaintiff in error, and appropriating to its own use the Montgomery league of land immediately to the north of that here in controversy, Village Mills Company having in that case, pending its appeal from adverse judgment of the trial court, gone upon the land and begun to cut and remove merchantable timber therefrom. A majority of the judges of the Supreme Court of Texas, on December 29th, 1916, ordered a temporary injunction issued "restraining the defendant in error, its agents and employes from in anywise trespassing upon or cutting or removing timber from the tract of land described," etc., and on February 14, 1917, after hearing, the motion of defendant in error to dissolve such injunction was overruled, and a further order entered calculated to preserve

the corpus of the property that will be affected by the final judgment of the court, and to *maintain the relationship of the parties litigant thereto in the identical status occupied by them at the time of the beginning of the litigation involving title thereto and right of possession thereof.*

The attempt on the part of the Village Mills Company to destroy the subject-matter of the controversy before a judgment of the Supreme Court of Texas could act thereon having been called to the attention of that court before the plan to so thwart its judgment had been executed, or more than fairly begun, remedy by injunction seemed reasonably adequate, while in the case at bar on the adjoining land these same wrong-doers, together with other respondents, have so far succeeded in anticipating the judgment of this court as to have already removed and destroyed a large part of the corpus of the property, the subject-matter of this litigation, constituting its chief value, hence remedy by injunction alone at this time will be clearly inadequate, and anything approaching full relief will necessarily require that that portion of the subject-matter of this litigation so wrongfully taken and destroyed pending this litigation and while subject to the exercise of the jurisdiction of this court be replaced, not in kind, because that is impossible, but in money representing the value of the property so taken and destroyed, and money representing the value of the occupancy and use of the land by respondents during the time they have wrongfully occupied same.

While the proceedings of the Supreme Court of Texas hereinbefore cited in the companion case of the Houston Oil Company of Texas v. Village Mills Company, there pending, do not yet appear in any published reports, re-

spondents are entirely familiar therewith, the parties thereto being practically the same, your petitioner being the plaintiff in error in that case, and the defendant in error therein being the Village Mills Company, one of the respondents in this suit, and having been represented therein by Messrs. William D. Gordon, Harrison M. Whitaker, Thomas J. Baten, and Eugene E. Easterling as its counsel, all of whom are respondents herein.

Respectfully submitted,

WILLIAM L. MARBURY,

THOMAS M. KENNERLY,

*Attorneys for Petitioners, Houston
Oil Company of Texas, Kirby Lum-
pany, and Maryland Trust Com-
pany.*

HEAD, DILLARD, SMITH, MAXEY & HEAD,
MARBURY, GOSNELL & WILLIAMS,
PARKER & KENNERLY,
Of Counsel.

APPENDIX.

EXHIBIT A.

Lis Pendens Record.....*County, Texas.*

Cornelia G. Goodrich et al., Plaintiffs,
File No. C. L. 408.

Houston Oil Company of Texas, et als., Defendants.

Suit filed in the U. S. District Court, Eastern District of Texas, at Beaumont.

General object of the action, suit attachment, execution, levy or other proceeding a suit in trespass to try title to the north 2578 acres of the Charles A. Felder league of land situated in Hardin County, Texas.

Location, quantity and description of real estate affected, the north 2578 acres of the Charles A. Felder league of land situated in Hardin County, Texas, granted by the Government of Coahuila and Texas to Charles A. Felder, notice is hereby given that said cause is pending on writ of error to be sued out by the defendants Houston Oil Company of Texas et als, from the United States Circuit Court of Appeals at New Orleans to review the judgment of the U. S. District Court for the Eastern District of Texas rendered therein on the 2nd day of December 1912 in cause No. 408 C. L. in said Court.

Names of persons whose interest or estate is intended to be affected by the action, suit, attachment, levy or other proceeding; Cornelia G. Goodrich et als plaintiffs in said suit and Fannie M. Allen et als intervenors there therein, whose names will more fully appear from the petitioners of said plaintiffs and intervenors in said Suit. Also the interest if any, of W. D. Gordon, E. E. Easterling, H. M. Whitaker and T. J. Baten attorneys for the plaintiffs and intervenors in said suit.

Signed: HOUSTON OIL COMPANY OF TEXAS,
MARYLAND TRUST COMPANY,
KIRBY LUMBER COMPANY,
Plaintiffs in error.

By CHARLES T. BUTLER,
Attorney of Record.

Sworn to and subscribed before me this the 29th day of April 1913.

Witness my hand and official seal.

(seal)

J. J. BEVIL, *County Clerk,*
Hardin County, Texas.

By M. L. CHANCE, *Deputy.*

Filed for record at 2 o'clock P. M. on the 29th day of April 1913; recorded at 2-30 o'clock P. M. on the 29th day of April 1913.

(seal)

J. J. BEVIL, *County Clerk,*
Hardin County, Texas.

By M. L. CHANCE, *Deputy.*

STATE OF TEXAS)
COUNTY OF HARDIN)

I, J. J. Bevil, Clerk of the County Court of Hardin County, Texas, do hereby certify that the foregoing is a true and correct copy of lis pendens in case of Goodrich et als vs Houston Oil Company of Texas et al. as same appears of record in Vol. 1, page 40, Lis Pendens Record.

Given under my hand and the seal of said Court at office in Kountze this the 31st day of January, A. D. 1917.

(Seal)

J. J. BEVIL, *Clerk County Court,*
Hardin County, Texas.

By M. HEARD, *Deputy.*

EXHIBIT B.

UNITED STATES OF AMERICA,
FIFTH JUDICIAL CIRCUIT, ss.

—
THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judge of the District Court of the United States for the Eastern District of Texas,—
GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the Houston Oil Company of Texas, Kirby Lumber Company, and Maryland

Trust Company, plaintiffs in error, and Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, the heirs of William M. Goodrich, deceased, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the Texas Builders Supply Company, defendants in error, a manifest error hath happened, to the great damage of the said Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, plaintiffs in error, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, La., in said Circuit, in not exceeding thirty days from the 3rd day of February, 1915, being the date of the issuance of the citation herein, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 3 day of Feb'y, in the year of our Lord one thousand nine hundred and fifteen.

J. R. BLADES,

(Seal)

Clerk of the District Court of the United States for the Eastern District of Texas.

Allowed by

GORDON RUSSELL,

United States District Judge.

(Endorsed:)

I hereby certify that a true copy of the within writ

has this day been lodged in the Clerk's office for the use of the defendant in error.

Dated 3rd day of February, 1915.

J. R. BLADES,
*Clerk of the Dist. Court of the United
States for the Eastern District of Texas.*

(Further endorsed:)

No. 408. Cornelia G. Goodrich, et al. v. Houston Oil Co. of Texas, et al. Writ of error. Filed 3 day of Feby., A. D. 1915. J. R. Blades, Clerk.

(Further endorsed:)

No. 408. Cornelia G. Goodrich, et al. v. Houston Oil Co. of Texas, et al. Copy of Writ of Error, for use of defendant in error. Filed 3rd day of February, A. D. 1915. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

A true copy, I certify.

Attest: J. R. BLADES, *Clerk*,
By C. C. BUMPAS, *Deputy*.

UNITED STATES OF AMERICA,
FIFTH JUDICIAL CIRCUIT, ss.

THE PRESIDENT OF THE UNITED STATES,

To Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, the heirs of William M. Goodrich, deceased, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the Texas Builders' Supply Company, and W. D. Gordon, Thomas J. Baten, H. M. Whitaker, and E. E. Easterling, their solicitors of record,
Greeting:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of New Orleans, in the State of Louisiana, in said Circuit, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States for the Eastern Dis-

27

trict of Texas, wherein Houston Oil Company of Texas, Kirby Lumber Company and Maryland Trust Company are plaintiffs in error, and Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, the heirs of William M. Goodrich, deceased, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the Texas Builders Supply Company are defendants in error, to show cause, if any there be, why the judgments rendered against said plaintiffs in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 3rd day of February, A. D. 1915, and of the Independence of the United States the one hundred and thirty-ninth year.

(Signed) GORDON RUSSELL,
United States District Judge.

(Endorsed:) Marshal's Return.

This writ came to hand on February 3rd, 1915, and executed same on February 6th, 1915, by delivering a certified copy of the within writ to W. D. Gordon, attorney for plaintiffs, E. E. Easterling, attorney for the intervenors, and to the Texas Builders' Supply Company, by delivering a copy of the within writ to Geo. C. DeYoung, President of said company, at Beaumont, Texas, on February 6th, 1915, each copy being certified to by the Clerk of this court.

B. F. SHERRELL, *U. S. Marshal, E. D. Tex.*
By J. F. McDONALD, *Deputy.*

(Further endorsed)

U. S. District Court, E. D. T. at Beaumont, D. L. No. 408. Cornelia G. Goodrich, et al. vs. Houston Oil Company of Texas, et al. copy of Citation for use of Defend-

ant in Error. Filed 6th day of Feby. A. D. 1915. J. R. Blades, Clerk, by C. C. Bumpas, Deputy.

A true copy, I certify, this 29th day of January, A. D. 1917.

J. R. BLADES, *Clerk,*

By (Signed) C. C. BUMPAS, *Deputy.*

(Seal)

UNITED STATES OF AMERICA,
Fifth Circuit, ss.
EASTERN DISTRICT OF TEXAS.

I, J. R. BLADES, Clerk of the District Court of the United States for the Eastern District of Texas, do hereby certify the foregoing pages from 1 to Two, inclusive, to be a true and corect copy of the Copy of writ of error, for use of defendant in error, filed on February 3rd, 1915; and copy of citation, for use of defendant in error, filed February 6th, 1915 in Cause No. 408, on the Law Docket of said Court, entitled

Cornelia G. Goodrich, et al.

versus

Houston Oil Company of Texas, et al.

as fully as the same now appears on file in my office at Beaumont.

TO CERTIFY WHICH, witness my hand and the seal of said court at Beaumont, in said District, this the 29th day of January A. D. 1917.

J. R. BLADES,

Clerk U. S. District Court, E. D. Texas.

(Seal)

By (Signed) C. C. BUMPAS, *Deputy.*

Endorsements:

D. L. No. 408. UNITED STATES DISTRICT COURT.
Eastern District of Texas. Cornelia G. Goodrich, et al.
vs. Houston Oil Co. of Tex., et al. CERTIFIED COPY
OF Writ of error, for use of defendant in error and copy
of citation in error, for use of defendant in error.

EXHIBIT C.

(Copy)

UNITED STATES OF AMERICA,

Fifth Judicial District, ss.

THE PRESIDENT OF THE UNITED STATES,

To the Honorable the Judge of the District Court of the United States for the Eastern District of Texas,
GREETING:

BECAUSE in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, between the Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, plaintiffs in error, and Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery, and wife, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, the heirs of William M. Goodrich, deceased, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the Texas Builders' Supply Company, defendants in error, a manifest error hath happened, to the great damage of the said Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, plaintiffs in error, as by their complaint appears; we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fifth Circuit, together with this writ, so that you have the same at New Orleans, La., in said Circuit, in not exceeding thirty days from the 3rd day of Feby., 1915, being the date of issuance of the citation herein, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said United States Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 3rd day of Feb'y, in the year of our Lord one thousand nine hundred and fifteen.

(SEAL)

(Signed) J. R. BLADES,
Clerk of the District Court of the United
States for the Eastern District of Texas.

Allowed by

(Signed) GORDON RUSSELL,
United States District Judge.

I hereby certify that a true copy of the within writ has this day been lodged in the Clerk's office for the use of the defendant in error.

Dated 3rd day of February, 1915.

J. R. BLADES,
Clerk of the Dist. Court of the United
States for the Eastern District of Texas.

By (Signed) C. C. BUMPAS, *Dep.*

Endorsed:

No. 408. Cornelia G. Goodrich, et al, vs. Houston Oil Co. of Texas, et al. Writ of Error. Filed 3d day of Feb'y., A. D. 1915. J. R. Blades, Clerk. No. 2748. U. S. Circuit Court of Appeals. Filed Mar. 8, 1915. Frank H. Mortimer, Clerk.

UNITED STATES CIRCUIT COURT of APPEALS
For the Fifth Circuit

I, FRANK H. MORTIMER, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing two pages, numbered from 1 to 2, inclusive, contain a true copy of the Writ of Error in the case of

CORNELIA G. GOODRICH, ET AL, Plaintiffs in Error,
No. 2748.
HOUSTON OIL COMPANY OF TEXAS, ET ALS, De-
fendants in Error.

as the same remains upon the files and records of said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 27th day of January, A. D. 1917.

(Signed) FRANK H. MORTIMER,
*Clerk of the United States Circuit Court of
 Appeals for the Fifth Circuit.*

(Seal)

Endorsed:

No. 2748. United States Circuit Court of Appeals for the Fifth Circuit. CORNELIA G. GOODRICH, ET AL, Plaintiffs in Error, vs. HOUSTON OIL COMPANY OF TEXAS, ET AL, Defendants in Error. COPY OF WRIT OF ERROR.

EXHIBIT D.

(Copy)

UNITED STATES OF AMERICA

Fifth Judicial Circuit, ss.

THE PRESIDENT OF THE UNITED STATES,

To Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery, and wife, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, the heirs of William M. Goodrich, deceased, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the Texas Builders' Supply Company, and W. D. Gordon, Thomas J. Baten, H. M. Whitaker; and E. E. Easterling, their solicitors of record, GREETING:

YOU ARE HEREBY CITED AND ADMONISHED to be and appear at a session of the United States Circuit Court of Appeals for the Fifth Circuit to be held at the City of New Orleans, in the State of Louisiana, in said Circuit, within thirty days from the date of this writ, pursuant to a writ of error filed in the Clerk's office of

the District Court of the United States for the Eastern District of Texas, wherein Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company are plaintiffs in error, and Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery, and wife, Mary W. Montgomery, Helen M. Krasica, Jean Krasica, the heirs of William M. Goodrich, deceased, and Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, and the Texas Builders' Supply Company, are defendants in error, to show cause, if any there be, why the judgments rendered against said plaintiffs in error as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable ERWARD DOUGLASS WHITE, Chief Justice of the United States, this 3rd day of February, A. D. 1915, and of the independence of the United States the one hundred and thirty-ninth year.

(SEAL)

(Signed) GORDON RUSSELL,
United States District Judge.

MARSHAL'S RETURN.

This writ came to hand on Feb. 6th, 1915, and executed same by delivering to W. D. Gordon, attorney for the plaintiffs; to E. E. Easterling, attorney for the Intervenor, and to the Texas Builders Supply Company, (by delivering to Geo. C. DeYoung, its president) each, in person, a copy of the within writ certified by the clerk of the U. S. District Court for the Eastern District of Texas, all served at Beaumont, Texas, on February 6th, 1915.

B. F. SHERRELL, *U. S. Marshal.*
E. D. Texas.

By (signed) J. F. McDONALD,
Deputy.

(Seal)

Endorsed:

No. 408. Cornelia G. Goodrich, et al. vs. Houston Oil Co. of Texas, et al. Citation. Filed 3 day of Feb'y, A. D. 1915. J. R. Blades, Clerk. No. 2748. U. S. Circuit Court of Appeals. Filed March 8, 1915. Frank H. Mortimer, Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS
For the Fifth Circuit

I, FRANK H. MORTIMER, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the foregoing two pages, numbered from 1 to 2, inclusive, contain a true copy of the Citation on Writ of Error in the case of

CORNELIA G. GOODRICH, ET ALS, Plaintiffs in Error,

No. 2748.

versus

HOUSTON OIL COMPANY OF TEXAS, ET AL, Defendants in Error,

as the same remains upon the files and records of said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals, at the City of New Orleans, Louisiana, this 27th day of January, A. D. 1917.

(SEAL)

(Signed) FRANK H. MORTIMER,
*Clerk of the United States Circuit Court
of Appeals for the Fifth Circuit.*

AFFIDAVIT OF T. M. KENNERLY.

No. 335

IN THE SUPREME COURT OF THE UNITED
STATES

October Term, 1916.

HOUSTON OIL COMPANY OF TEXAS, Et AL,
Petitioners,

versus

CORNELIA G. GOODRICH, Et AL,

Respondents,

THOMAS M. KENNERLY, of Houston, Harris County, Texas, being duly sworn, says on oath, as follows:

(1) That he is one of the General Attorneys of the Houston Oil Company of Texas, and is one of the Attorneys in charge of the above cause for the Houston Oil

Company of Texas, Kirby Lumber Company, and Maryland Trust Company (Defendants in the Lower Court, but here referred to as Petitioners).

(2) That he is informed and believes, and upon such information and belief states the facts to be, that Cornelia G. Goodrich, a *feme sole*, Edward L. Montgomery, Jr., and Margaret W. Montgomery, a *feme sole*, are citizens of the City and County of New York, State of New York, and of the Southern Judicial District of the State of New York, and Edward L. Montgomery and wife Mary W. Montgomery are citizens of Sullivan County, State of New York, and of the Southern Judicial District of the State of New York, Helen M. Krasica and husband Jean Krasica are citizens of the City of Paris, Republic of France, and that they were Plaintiffs in the District Court, and are represented in this cause by William D. Gordon and Thomas J. Baten, of Beaumont, Jefferson County, in the Eastern Judicial District of Texas; that Fannie M. Allen, a *feme sole*, Mary M. Steadman, a *feme sole*, and Ophelia M. Cox and husband Louis L. Cox, are residents of the County of Franklin and State of Kentucky, and of the Eastern Judicial District of the State of Kentucky, and that they were Intervenors in the Trial Court, and are represented in this cause by Harrison M. Whitaker and Eugene E. Easterling, of Beaumont, Jefferson County, in the Eastern Judicial District of Texas: all of whom are referred to herein as "*Parties Respondent*." That William D. Gordon, Thomas J. Baten, Eugene E. Easterling, and Harrison M. Whitaker, of the City of Beaumont, Jefferson County, Texas, in the Eastern Judicial District of Texas, are Attorneys for said Parties Respondent in this cause and have been since the institution of this suit, and are referred to herein as "*Attorneys Respondent*." That the Village Mills Company is a corporation and citizen and resident of and having its domicile at Fletcher, in the County of Hardin and State of Texas, in the Eastern Judicial District of Texas (and of which corporation J. Ben Hooks of Hardin County, Texas is President, and said Thomas J. Baten of Jefferson County, Texas is Vice President, and Wiley J. Bracken of Hardin County, Texas is Secretary). That

J. Ben Hooks and Wiley J. Bracken are residents of Hardin County, Texas, in the Eastern Judicial District of Texas. All of said persons are collectively referred to herein as "*Respondents*."

(3) That this cause involves 2578 acres of land, more or less, a part of the Charles A. Felder headright survey in Hardin County, Texas, described as follows (Rec., p. 8):

"a part of a league granted by the Mexican Government to Charles A. Felder, and particularly described as follows: Beginning at the N. E. corner of said league on the west bank of the Neches River; Thence West with the N. B. line of said league to the N. W. corner of the Same; Thence South with the W. B. line of said league to a point on said W. B. line from which a line projected East to the Neches River running parallel with the N. B. line of said league, will include between said N. B. line and the line so projected 2578 acres; Thence North from the point so established on the Neches River with its meanders to the place of beginning;"

and was instituted in the District Court of the United States for the Eastern District of Texas, at Beaumont, against Petitioners by Parties Respondent. The Plaintiffs' original petition was filed June 7, 1911 (Rec., p. 2), and the Interveners' petition was filed April 1, 1912. (Rec., p. 7.)

(4) Affiant is informed and believes, and upon such information and belief alleges the facts to be, that at the time said suit was filed the Houston Oil Company of Texas was in actual possession of said tract of land, by and through its agent, contractor, or tenant, the Texas Builders' Supply Company (Rec., pp. 23 and 225-230), claiming same under regular chain of title, and by the Statute of Limitations, as set forth in the Record in this cause, and it, and those under whom it claims, had been so claiming and in possession of same for many years prior to the institution of this suit.

(5) That the Maryland Trust Company, Trustee, is the mortgagee of the Houston Oil Company of Texas,

holding a mortgage on the tract of land involved in this suit, and the Kirby Lumber Company has a contract with the Houston Oil Company of Texas under which it has the right to purchase, cut, and remove the yellow pine timber twelve inches or more in diameter from the land in controversy, at the price at this time of Five Dollars per thousand feet.

(6) This cause was first tried, and judgment entered, December 2, 1912, in favor of Parties Respondent for title and possession of said land, against Petitioners and against the Houston Oil Company of Texas for damages in the sum of \$1286, with interest, and costs of Court. (Rec., p. 27.)

(7) Upon the rendition of said judgment of December 2, 1912, Petitioners sued out a writ of error to the Honorable Circuit Court of Appeals for the Fifth Circuit, which Court, on February 10, 1914, reversed said judgment of December 2, 1912 and remanded this cause to said District Court for a new trial. (Rec., p. 36.) (213 Fed., 136.) Thereupon, Parties Respondent filed in this Court their petition for *certiorari*, which was denied May 25, 1914. (234 U. S., 759.)

(8) Pending the prosecution of said writ of error from said judgment of December 2, 1912, the Petitioners filed or caused to be filed on April 29, 1913, in the office of the Clerk of the County Court of Hardin County, Texas, in which county the land in controversy is located, a *lis pendens* notice, as required by the laws of Texas, (a certified copy of which is hereto attached, marked "Exhibit A," and made a part hereof).

(9) Pending the prosecution of said writ of error from said judgment of December 2, 1912, Parties Respondent and Attorneys Respondent caused to be issued out of said District Court a writ of possession, and caused same to be executed by ousting Petitioners and placing Parties Respondent in actual possession of said tract of land. (Rec., pp. 34-36.)

(10) The mandate of the Circuit Court of Appeals was filed in the District Court June 14, 1914, and at the first term of said District Court, after the filing of said

mandate, Petitioners filed in said Court their motion for restitution, wherein they prayed that said judgment of December 2, 1912 having been reversed and set aside, possession of said tract of land be restored to them. (Rec., pp. 36-48.) The Trial Court heard said motion, but refused to rule thereon. But after the trial of the case upon its merits, which trial resulted, on December 1, 1914, in a judgment for Parties Respondent for the land sued for and for said sum of \$1286 (Rec., pp. 806-807), said Court did, on December 2, 1914, overrule said motion. (Rec., p. 810.)

(11) Thereupon, the Petitioners filed motion for new trial (Rec., p. 811), which motion was overruled. (Rec., p. 857.) Petitioners applied to the Judge of the District Court for writ of error, same to act as supersedeas (Rec., p. 862), and filed their assignments of error. (Rec., p. 864.) On February 3, 1915, the Judge of said District Court, by order entered in said Court, granted writ of error, same to act as supersedeas. (Rec., p. 960.) On February 3, 1915, Petitioners presented their supersedeas bond, which was approved and ordered filed on same date by the Judge of the Court, and was filed on same date. (Rec., p. 960.) On February 3, 1915, writ of error was issued and filed in the office of the Clerk of said District Court, and on February 3, 1915 Petitioners caused to be lodged in the office of the Clerk of said District Court, where the record remains, a copy of said writ of error for Parties Respondents herein, they being the adverse parties in said cause, and said copy has since said time been and remained on file in the office of said District Clerk. (Certified copy of same and citation in error and officer's return thereon and a certificate of the Clerk showing such fact are hereto attached, marked "Exhibit B," and made a part hereof.) The original writ of error was transmitted by the Clerk of said District Court to the Clerk of said Circuit Court of Appeals. A certified copy of said original writ of error, together with indorsements thereon, from the office of the Clerk of said Circuit Court of Appeals is attached hereto, marked "Exhibit C," and made a part hereof.) On February 3, 1915, citation in error was duly issued by the Clerk of said District Court,

and on February 6, 1915 duly served upon Parties Respondent. Said original citation in error, together with the officer's return thereon, was thereupon transmitted to the Clerk of the United States Circuit Court of Appeals. (Certified copy thereof, together with the officer's return thereon, is hereto attached, marked "Exhibit D," and made a part hereof.) Before transmitting said citation in error to the Clerk of said Circuit Court of Appeals, Petitioners caused to be lodged, on February 6, 1915, in the office of the Clerk of the District Court for the Parties Respondent, they being the adverse parties herein, a copy of said citation in error. (A certified copy of same is attached hereto, marked "Exhibit B," and made a part hereof.) Said writ of error was so sued out and copy thereof lodged in the office of the said Clerk of said District Court, and said bond filed, and said citation in error issued and served, within sixty days, Sundays exclusive, after the rendition of said judgment of December 1, 1914, in accordance with Section 1007 of the Statutes of the United States, and said writ of error was sued out not only from said judgment of December 1, 1914, but also from the order of December 2, 1914 overruling Petitioners' motion for restitution. (Rec., p. 960.)

(12) Upon the perfecting of said writ of error and supersedeas, as aforesaid, the record was duly filed in the office of the Clerk of the said Circuit Court of Appeals, and Petitioners renewed in that Court their motion for restitution of said premises, and no order was entered thereon by said Court. (Rec., p. 972.) Said Circuit Court of Appeals, on October 4, 1915, affirmed the judgment of the Trial Court (Rec., p. 988), and upon Petitioners filing their motion for re-hearing (Rec., p. 991), overruled same (Rec., p. 999), whereupon Petitioners applied to this Court, on January 8, 1916, and were granted, on January 31, 1916, writ of *certiorari*. And, in obedience to said writ of *certiorari*, the record has been sent up and printed, and this cause is now pending before this Court.

(13) Affiant is informed and believes, and upon such information and belief states the facts to be, that at the time of the filing of this suit, and prior thereto, and at the time of the trial of this cause in said District Court

on December 2, 1912, there was situated upon said tract of land a large quantity of standing and growing yellow pine trees or timber. Said tract of land also consisted, in part, of commercial sand, and there was located upon same, and in operation, a sand pit, with all usual and necessary equipment for the purpose of mining and loading said sand onto cars, with necessary switch tracks, loading tracks, etc., together with houses occupied as residences by persons engaged in such operations, and as a place to store the equipment used in such operations, all of which constituted or was known as the station of Fletcher, or sometimes as Sand Pit F, all of which operations were being carried on by the Texas Builders' Supply Company, the agent, contractor, or tenant of said Houston Oil Company of Texas, and all of which equipment, houses, etc. were in the possession of and owned and claimed by said Oil Company, or by its said agent, contractor, or tenant. The chief value of said tract of land was the yellow pine timber thereon.

(14) That affiant believes and so charges, that soon after the rendition of the judgment of December 2, 1912, and about the time of suing out by Petitioners of their writ of error from said judgment of December 2, 1912, the said Parties Respondent and said Attorneys Respondent, some or all, conceived and formed the purpose, design, and scheme, and each with the others agreed and conspired to enter upon said tract of land, and into the improvements thereon, and take and remove such yellow pine timber and appropriate same to their own use and benefit, under conditions aptly calculated to enable them to escape liability therefor, regardless of whether said parties recovered title and possession to said tract of land, and the timber, sand, and improvements thereon, by final judgment in this cause, or did not so recover, and with the purpose and design, also, to have, take, and appropriate said timber so that when final judgment in this cause was entered the most valuable portion of said tract of land would have been appropriated by them, leaving only the land and improvements of minor value upon and against which the final judgment would operate.

That to aid in carrying out such design and scheme,

Parties Respondent and Attorneys Respondent sought the assistance and aid of said J. Ben Hooks and said Wiley J. Bracken, and said Hooks and Bracken, with full knowledge and notice of the title and claim of Petitioners to said land, and of the pendency of this suit, and of all the papers, pleadings, and proceedings in this cause at that time had, entered into said design and scheme as aforesaid with Parties Respondent and Attorneys Respondent, and each agreed and conspired with the others to carry out said design, scheme, and conspiracy.

(15) That affiant believes and so charges, that in carrying out said design, scheme, and conspiracy, and with the purpose, to avoid and escape personal financial liability therefor, and to cover up and conceal said design, scheme, and conspiracy, and to avoid the appearance of personally engaging therein, said Parties Respondent and Attorneys Respondent and said Hooks and Bracken, on the 19th day of July, 1913, organized and caused to be created, incorporated, and chartered under the laws of the State of Texas said Village Mills Company. (A copy of said charter and the affidavits accompanying same being hereto attached, marked "Exhibit E," and made a part hereof.) That under the law three persons are required to organize a corporation, and each corporation is required to have not less than three directors. In the organization of said Village Mills Company, said Hooks, said Baten, and said Bracken appear in the charter as the incorporators, and said persons became the directors of said corporation, and the President, Vice President, and Secretary thereof, respectively, and have been so continuously since that time, and are now. That said charter shows said Hooks, said Baten, and said Bracken to be the stockholders of said corporation, but affiant believes, and charges, that said stock was subscribed for and held by them, and is still held by them wholly or in part, for the use, benefit, and behoof of all the Respondents. That the capital stock of said Village Mills Company is only Twenty Thousand Dollars, of which only Ten Thousand Dollars (the smallest percentage of the whole permitted by law) is alleged by said charter and affidavits accompanying same to be at that time paid in.

(16) That affiant believes and so charges, that upon the organization of said corporation, the said Parties Respondent and Attorneys Respondent and said Hooks and said Bracken and said Village Mills Company, acting together and each acting for the others, and in furtherance of and carrying out said design, scheme, and conspiracy, and acting by themselves and through said Village Mills Company, on or about October 11, 1913 (having theretofore been placed in possession of said tract or parcel of land under and by virtue of the writ of possession issued on said judgment of December 2, 1912 as aforesaid, which judgment was reversed as aforesaid), began cutting and removing and appropriating to their own use and benefit the said timber thereon, and have continuously from time to time since so been cutting, removing and appropriating said timber. That since originally beginning such operations Respondents have so cut, removed, and appropriated approximately 12,811,459 feet of pine timber therefrom. That 4,317,464 feet of pine timber were so cut, removed, and appropriated during 1913 and 1914, prior to the granting and service of the supersedeas as hereinbefore set forth; and that since the granting of the supersedeas herein and the service of same as hereinbefore set forth, Respondents have so cut, removed, and appropriated 8,493,995 feet of pine timber therefrom, substantially all of which was so cut, removed, and appropriated since the granting by this Court of writ of *certiorari* herein.

All of which was done and is being done in carrying out the design, scheme, and conspiracy aforesaid—of appropriating the valuable portion of said tract of land to their own use and benefit, and so destroying the corpus of this property as that the final judgment of this court will be of avail only as to a minor portion thereof from the standpoint of value, and with the purpose of interfering with and defeating the jurisdiction of the said District Court, and the said Circuit Court of Appeals, and of this Court, over said property.

(17) That affiant is familiar with the house known as the W. T. Carroll house, referred to in the affidavits of W. A. McClelland, H. A. Woods, and Eugene Me-

Mahon bearing even date herewith, said house being an important piece of evidence in the defense of this cause in the claim of limitation, and being the subject of a great deal of testimony as shown by the printed record in this cause. That affiant passed Fletcher Station on the train in June, 1915, and said house was then still standing; that affiant passed said station again in October, 1916, and said house was gone, from which facts affiant is able to testify that said house was destroyed, as shown by the affidavits of said W. A. McClelland, Eugene McMahon, and H. A. Woods, after the granting and service of the supersedeas in this cause, and affiant believes and so charges that same was destroyed after the granting by this court of writ of *certiorari* herein.

THOMAS M. KENNERLY.

Sworn to and subscribed before me by Thomas M. Kennerly, this, the 19th day of February, A. D. 1917.

LULA B. REYNOLDS,

Notary Public in and for Harris Co., Texas.

(SEAL)

EXHIBIT E.

(COPY.)

THE STATE OF TEXAS,
COUNTY OF JEFFERSON.

KNOW all men by these presents that we, J. B. Hooks, and W. J. Bracken, both of Hardin County, Texas, and Thomas J. Baten of Jefferson County, Texas, under and by virtue of the laws of this State do hereby form and incorporate ourselves into a voluntary association, under the terms and conditions hereinafter set out, as follows:

1.

The name of this corporation is "The Village Mills Company."

2.

The purpose for which this corporation is formed is for the construction, maintenance and operation of mills for the purpose of manufacturing and selling lumber, ties and piling, and for the purpose of building and operating such tram roads as may be necessary to supply said mill with raw material, and as may be incidental to the business of manufacturing lumber.

3.

The place where the business of the corporation is to be transacted is at Fletcher, Hardin Co., Texas, Post office, Lumberton, Hardin Co., Texas.

4.

The term for which this corporation is to exist is Twenty (20) years.

5.

The number of directors and the officers of this corporation for the first year, with their postoffice addresses, are as follows:

J. B. Hooks, President and Treasurer, Kountze, Texas.
W. J. Bracken, Secretary and Manager, Kountze, Texas.
Thos. J. Baten, Vice President, Beaumont, Texas.

6.

The capital stock of this corporation is Twenty Thousand Dollars (\$20,000.00) divided into two hundred (200) shares of One Hundred (\$100) Dollars each; all of which capital stock has been subscribed and fifty per cent actually paid in as per affidavit attached hereto.

IN WITNESS WHEREOF we have hereunto signed our names this the 19th day of July, A. D. 1913.

J. B. HOOKS,
W. J. BRACKEN,
THOS. J. BATEN.

STATE OF TEXAS,
COUNTY OF JEFFERSON.

Before me, the undersigned authority, on this day per-

sonally appeared J. B. Hooks, W. J. Bracken, and Thomas J. Baten, known to me to be the persons whose names are subscribed to the foregoing instrument, and severally acknowledged to me that they had executed the same for the purposes and consideration therein expressed.

Given under my hand and official seal, this the 19th day of July, 1913.

(SEAL)

L. E. NEY,
Notary Public in and for
Jefferson County, Texas.

THE STATE OF TEXAS,
COUNTY OF JEFFERSON.

Before me, the undersigned authority, on this day personally appeared J. B. Hooks, W. J. Bracken, and Thos. J. Baten, who each upon his oath says as follows:

1. That the residence and postoffice address of each affiant is as follows:

The said J. B. Hooks, and W. J. Bracken, Kountze, Hardin Co., Texas.

The said Thos. J. Baten, Beaumont, Jefferson Co., Texas.

2. That each affiant has subscribed in good faith for the following proportion of the capital stock of the Village Mills Lumber Co., to-wit:

The said J. B. Hooks.....100 shares \$10,000.00

The said W. J. Bracken..... 50 shares 5,000.00

The said Thos. J. Baten..... 50 shares 5,000.00

of which amount of said stock, fifty (50%) per cent has been paid in cash.

Witness our hands this the 19th day of July, 1913.

J. B. HOOKS,
W. J. BRACKEN,
THOS. J. BATEN.

Subscribed and sworn to before me by each of said affiants, this the 19th day of July, A. D. 1913.

(SEAL)

L. E. NEY,
Notary Public in and for
Jefferson County, Texas.

ENDORSED: Filed in the Office of the Secretary of State this 22nd day of July, 1913.

F. C. WEINERT,
Secretary of State.

THE STATE OF TEXAS,
COUNTY OF JEFFERSON.

Before me, the undersigned authority, on this day personally appeared J. B. Hooks, W. J. Brackin and Thomas J. Baten, known to me, who having been by me first duly sworn, on oath say each for himself:

That they are the identical parties who executed the charter of the Village Mills Company as incorporators, and that they also compose the Board of Directors of said Village Mills Company as incorporators, and that they also compose the Board of Directors of said Village Mills Company; that the full amount of the capital stock of the said Company — \$20,000.00 has been in good faith subscribed, one-half having been paid at the time of the incorporation of said Company; that the other half, to-wit, \$10,000.00 has been paid in in cash; that the following are the names and postoffice addresses of the parties subscribing to the capital stock and the amount paid in by each:

J. B. Hooks, Kountze, Texas, \$10,000.00, amount paid \$10,000.00.

W. J. Brackin, Fletcher, Texas, \$5,000.00, amount paid \$5,000.00.

Thos. J. Baten, Beaumont, Texas, \$5,000.00, amount paid \$5,000.00.

That all the above subscription were paid in in cash; that the postoffice address of the said corporation is now Fletcher, in Hardin County, Texas, instead of Lumberton, in Hardin County, Texas, a postoffice having been established at Fletcher by the United States Government since the organization of this Company.

THOS. J. BATEN,
J. B. HOOKS,
W. K. BRACKEN.

Subscribed and sworn to by Thomas J. Baten before me, this 20th day of July, A. D. 1915.

(SEAL) T. M. LACK,
Notary Public in and for
Jefferson County, Texas.

Subscribed and sworn to by J. B. Hooks, before me, this 21st day of July, A. D. 1915.

(SEAL) B. A. COE,
Notary Public in and for
Hardin County, Texas.

Subscribed and sworn to by W. J. Brackin before me, this 21st day of July, A. D. 1915.

(SEAL) B. A. COE,
Notary Public in and for
Hardin County, Texas.

ENDORSED: Filed in the Office of the Secretary of State this 22nd day of July, 1915.

JNO. G. MCKAY,
Secretary of State.

THE STATE OF TEXAS

Department of State.

I, C. J. BARTLETT, Secretary of State of the State of Texas, and being the officer who, under the Constitution and Laws of this State, is the duly constituted keeper of the records of the Articles of Incorporation of all companies incorporated under the General Laws thereof, and the records of all papers relating to the creation of said incorporated companies, and empowered to authenticate exemplifications of the same, DO HEREBY CERTIFY, that the annexed instrument is an exemplified copy, carefully compared by me with the original now on file in my office, in my official custody as Secretary of State, and has been found to be a true and correct copy of the charter of the Village Mills Company, together with proof of final payment and affidavit attached thereto, filed in this office on 22nd day of July, A. D. 1913, and

duly recorded in the Records of Incorporations now on file in this Department; that said exemplification is in due form and made by me as the proper officer, and is entitled to have full faith and credit given it in every court and office within the United States of America.

IN TESTIMONY WHEREOF I have hereunto signed my name officially and caused to be impressed hereon the Great Seal of State, at my office in the City of Austin, Texas, this the 3rd day of January, A. D. 1917.

(SEAL)

(Signed) C. J. BARTLETT,
Secretary of State.

AFFIDAVIT OF W. A. McCLELLAND.

No. 335.

IN THE SUPREME COURT OF THE UNITED
STATES.

October Term, 1916.

Houston Oil Company of Texas,
Kirby Lumber Company, and
Maryland Trust Company,
Petitioners,

vs.

Cornelia G. Goodrich, Et Al.

BEFORE ME, the undersigned authority, on this day personally appeared W. A. McClelland, who, being by me first duly sworn, says on oath, as follows:

I.

I reside at Silsbee in Hardin County, Texas, and am a timber inspector in the employ of the Southwestern Settlement and Development Company (not incorporated), which company succeeded as to the timber and timber lands the Houston Oil Company of Texas. I have been in the employ of said Development Company since August 1, 1916. Previous to August 1, 1916, I was for ten years in the employ of the Houston Oil Company of Texas, as timber inspector.

II.

I know and am well acquainted with the 2578-acre tract of land out of the Charles A. Felder league in Hardin County, Texas, which is involved in this suit of Houston Oil Company of Texas et al. v. Cornelia G. Goodrich et al. I have known said tract of land since about 1906. Same is located about five miles from Silsbee, Hardin County, Texas, where I reside, and have resided for a number of years. As a timber inspector for the Houston Oil Company of Texas, it was my duty to police the tracts or parcels of land claimed by said company in Hardin County, Texas, including the said 2578 acres out of the Charles A. Felder league, and in the performance of my said duties I was frequently upon said Charles A. Felder league. At the time I went into the employ of the Houston Oil Company of Texas (in April, 1906), I found said 2578 acres to be in the actual possession of the Houston Oil Company of Texas, in that there was located thereon a sand pit where commercial sand was mined by the Texas Builders Supply Company, a tenant or contractor under said Houston Oil Company of Texas, and said tract of land was continuously in such actual possession of the Houston Oil Company of Texas until said Oil Company was ejected therefrom by the Marshal of the Eastern District of Texas under process issued out of the United States District Court on February 27, 1913. My testimony given upon the trial of this case and shown in the printed record is full, complete, and correct.

III.

About October 11, 1913, the Village Mills Company (of which J. Ben Hooks is president, Thomas J. Baten, vice president, and Wiley J. Bracken, secretary and treasurer), began cutting, removing, and hauling away the pine timber from said tract of land, and so continued until about November, 1914, during which time they cut, removed and carried away 4,317,464 feet of pine timber, as fully shown in affidavit of myself and Eugene McMahon of this date.

IV.

Soon after I went into the employ of the Houston Oil Company of Texas (April, 1906) and went upon said tract of land, I observed the houses, sand pit, and improvements situated thereon and claimed by said Oil Company, included in which there was a house about which there was much testimony on both trials of this case in the District Court, said house being known as the W. T. Carroll house on account of the claim that same was built by W. T. Carroll in 1901. Said house is shown in the photographs sent up with the record in this case, being referred to as Photograph No. 1. Said house was situated about fifty (50) feet from the right-of-way of the Santa Fe Railroad, and west of said railroad. Said house was one of the important pieces of evidence in support of the limitation claim of the Houston Oil Company of Texas et al to said tract of land. About six or eight months ago I noticed that said house had been totally destroyed, and it can not now be even told that a house stood there. I do not know the exact date that such house was destroyed, but I pass Fletcher Switch, where the house stood, on an average of once a week, and I did not miss the house until six or eight months previous to making this affidavit. On February 9, 1917, I asked Pink Wiggins, who is the agent and bookkeeper for the Village Mills Company, what had become of this house. He replied that they (meaning the Village Mills Company, and its officers, agents and employes) had burned it up; that the health officer had condemned it.

V.

The Village Mills Company did not cut but very little, if any, timber from this tract of land during the year 1915; in fact, I do not think they cut any; but about the 1st of January, 1916, they again began cutting, removing and carrying away pine timber from said tract of land, which cutting, removing and carrying away continued with practically no intermission up to about January 1, 1917, at which time same stopped because all the pine timber had been so cut, removed and carried away by

the Village Mills Company. During 1916 said Village Mills Company so cut, removed and carried away 8,493,995 feet of pine timber from said tract. Substantially all of said 8,493,995 feet of pine timber was so cut from said tract of land since the Supreme Court of the United States granted writ of certiorari in this cause on January 31, 1916. I would say that probably 755,000 feet of this timber was cut during the month of January, 1916. The sizes, number, etc., of the trees so cut during 1916 are shown in affidavit of W. A. McClelland, H. A. Woods and Eugene McMahon of this date. As stated, all of the pine timber has been cut, removed and carried away from that portion of this tract of land lying east of Village Creek by the Village Mills Company since the filing of this suit and during the time above set forth, said portion of said tract being cut clean.

(Signed) W. A. McCLELLAND.

Sworn to and subscribed before me by W. A. McClelland, this the 19th day of February, A. D. 1917.

(SEAL)

(Signed) LULA B. REYNOLDS,
Notary Public in and for Harris Co., Texas.

AFFIDAVIT OF EUGENE McMAHON, W. A. McCLELLAND, AND
H. A. WOODS.

No. 335.

IN THE SUPREME COURT OF THE UNITED
STATES.

October Term, 1916.

Houston Oil Company of Texas,
Kirby Lumber Company, and
Maryland Trust Company,
Petitioners,

vs.

Cornelia G. Goodrich, Et Al.,
Respondents.

BEFORE ME, the undersigned authority, on this day personally appeared Eugene McMahon, W. A. McClelland, and H. A. Woods, who, being by me first duly sworn, each say on oath, as follows:

I.

We and each of us are in the employ of the Southwestern Settlement and Development Company (not incorporated), which company succeeded the Houston Oil Company of Texas insofar as the land and timber lands are concerned, and have been in the employ of said Development Company since August 1, 1916. Previous to August 1, 1916, we were in the employ of the Houston Oil Company of Texas, as timber inspectors, and had been so employed for a number of years.

II.

We are familiar with the location of the 2578 acres of land out of the Charles A. Felder League involved in this suit. In November, 1914, we were instructed by the Houston Oil Company of Texas to scale up and ascertain the quantity of timber which had at that time been cut from said tract of land by the Village Mills Company, and found the quantity to be as set forth in the affidavit of W. A. McClelland and Eugene McMahon of this date. Up to that time (November, 1914), the Village Mills Company had cut over approximately 900 acres of said tract of land.

III.

Recently, we were instructed to examine, scale up, and ascertain the quantity of timber cut by the Village Mills Company from said tract of land during the year 1916, and also the area cut over during said period, and we went upon said tract of land, made a full and thorough and correct investigation of the quantity of timber, and found that there has been cut therefrom the following pine trees during said time:

"Stump		Total	
Dia.	No. Stumps	Ft. Per Tree	Ft. Per Class
8	488	19	9,272
9	355	27	9,585
10	451	39	17,589
11	450	53	23,850
12	1622	70	113,540
13	1294	97	125,518
14	1528	129	197,112
15	1864	170	316,880
16	2061	220	453,420
17	1964	272	534,208
18	2095	326	682,970
19	1650	379	625,350
20	1612	431	694,772
21	1349	485	654,265
22	1308	540	706,320
23	877	597	523,569
24	1031	653	673,243
25	569	710	403,990
26	435	769	334,515
27	295	826	243,670
28	281	887	249,247
29	165	946	156,090
30	180	1007	181,260
31	93	1060	98,580
32	134	1123	150,482
33	70	1182	82,740
34	47	1240	58,280
35	37	1298	48,026
36	43	1353	58,179
37	13	1412	18,356
38	13	1470	19,110
39	9	1527	13,743
40	7	1582	11,074
42	1	1698	1,698
43	2	1746	3,492
<hr/> 24,393		<hr/> 8,493,995''	

IV.

We found also that the area cut over during 1916 amounted to about 1,034 acres, from which, as aforesaid, there was cut 8,493,995 feet of pine timber.

V.

We are familiar with the reasonable market value of pine timber in the vicinity of the tract of land involved in this suit during the years 1913, 1914, 1915, and 1916, and in our opinion the pine timber which was cut by the Village Mills Company from said tract of land was, and is, of the reasonable market value of at least Five Dollars (\$5.00) per thousand feet. We are also familiar with the reasonable market value of land in the vicinity of the tract of land involved in this suit, and in our opinion said tract of land, stripped of the pine timber which formerly stood thereon and which stood thereon at the time of the institution of this suit, is not worth more than Two Dollars (\$2.00) per acre.

VI.

We and each of us are familiar with the old house known as the W. T. Carroll house and shown in photograph No. 1 offered in evidence in this case, and which formerly stood about 50 feet from the right-of-way of the Santa Fe Railroad and west thereof, which house was one of the pieces of evidence testified about, and in part forming the basis of the limitation claim of the Houston Oil Company of Texas, et al., to said tract of land. Said house has been completely and entirely destroyed, and there is now no sign upon the ground showing where it stood.

(Signed) W. A. McCLELLAND.

(Signed) EUGENE McMAHON.

(Signed) H. A. WOODS.

Sworn to and subscribed before me by Eugene McMahon, W. A. McClelland, and H. A. Woods, this, the 19th day of February, A. D. 1917.

(SEAL)

(Signed) LULA B. REYNOLDS,
Notary Public in and for Harris Co., Texas.

AFFIDAVIT OF EUGENE McMAHON AND W. A. McCLELLAND.

No. 335.

IN THE SUPREME COURT OF THE UNITED
STATES.

October Term, 1916.

Houston Oil Company of Texas,
Kirby Lumber Company, and
Maryland Trust Company,
Petitioners,

vs.

Cornelia G. Goodrich, Et Al.

BEFORE ME, the undersigned authority, on this day personally appeared Eugene McMahon and W. A. McClelland, who, being by me first duly sworn, each say on oath, as follows:

I.

Prior to August 1, 1916, we and each of us were in the employ of the Houston Oil Company of Texas as timber inspectors, W. A. McClelland residing at Silsbee, in Hardin County, Texas, and Eugene McMahon residing at Kirbyville in Jasper County, Texas. Since August 1, 1916, we have been in the employ of the Southwestern Settlement and Development Company (not incorporated), which company is the successor of the Houston Oil Company of Texas insofar as timber and timber lands are concerned. W. A. McClelland was in the employ of the Houston Oil Company of Texas for about ten years. Eugene McMahon was in the employ of the Houston Oil Company of Texas for about ten years.

II.

In November, 1914, we and each of us were directed by the Houston Oil Company of Texas to investigate, report upon, and scale, and ascertain the quantity of timber which had at that time been cut from the 2578 acres of land out of the Charles A. Felder League in Hardin County, Texas, which was involved in the suit above named, Houston Oil Company of Texas, et al., v. Cornelius G. Goodrich, et al., which suit was then pending in the United States District Court for the Eastern

District of Texas. In accordance with such instructions, we went upon said tract of land and made a careful and thorough investigation of the timber cut therefrom, in such investigation being assisted by H. A. Woods, E. J. Newberry, and E. H. Hopson, with the following results:

“Scale of timber cut from the C. A. Felder League, Hardin County, by the Village Mills Company. Timber scaled by taking the stump diameter and computing the lengths of trees by the different classes found on the ground:

No. of Trees	Diameter at Base	Amount per Tree	Total Amt. Each Class
835 trees,	12 in. base dia.,	57 ft. per tree,	47,395 ft.
949 trees,	13 in. base dia.,	77 ft. per tree,	65,373 ft.
700 trees,	14 in. base dia.,	144 ft. per tree,	100,800 ft.
709 trees,	15 in. base dia.,	179 ft. per tree,	126,911 ft.
902 trees,	16 in. base dia.,	199 ft. per tree,	179,498 ft.
890 trees,	17 in. base dia.,	277 ft. per tree,	246,530 ft.
936 trees,	18 in. base dia.,	331 ft. per tree,	309,816 ft.
784 trees,	19 in. base dia.,	386 ft. per tree,	302,624 ft.
867 trees,	20 in. base dia.,	444 ft. per tree,	384,948 ft.
602 trees,	21 in. base dia.,	499 ft. per tree,	300,498 ft.
585 trees,	22 in. base dia.,	572 ft. per tree,	334,620 ft.
432 trees,	23 in. base dia.,	648 ft. per tree,	279,936 ft.
494 trees,	24 in. base dia.,	732 ft. per tree,	361,608 ft.
315 trees,	25 in. base dia.,	821 ft. per tree,	258,615 ft.
216 trees,	26 in. base dia.,	917 ft. per tree,	198,072 ft.
167 trees,	27 in. base dia.,	1018 ft. per tree,	170,006 ft.
143 trees,	28 in. base dia.,	1129 ft. per tree,	161,467 ft.
83 trees,	29 in. base dia.,	1245 ft. per tree,	104,335 ft.
71 trees,	30 in. base dia.,	1367 ft. per tree,	97,057 ft.
67 trees,	31 in. base dia.,	1496 ft. per tree,	100,332 ft.
30 trees,	32 in. base dia.,	1633 ft. per tree,	48,990 ft.
15 trees,	33 in. base dia.,	1776 ft. per tree,	26,640 ft.
12 trees,	34 in. base dia.,	1932 ft. per tree,	23,184 ft.
4 trees,	35 in. base dia.,	2074 ft. per tree,	8,296 ft.
8 trees,	36 in. base dia.,	2255 ft. per tree,	18,040 ft.
2 trees,	37 in. base dia.,	2451 ft. per tree,	4,842 ft.
3 trees,	38 in. base dia.,	2608 ft. per tree,	7,824 ft.

Total.....4,268,257 ft.

The above is for trees 12 in. and up.

Scale for trees less than 12 in. cut by the Village Mills Company from the Charles A. Felder League, Hardin County:

No. of Trees	Diameter at Base	Amount per Tree	Total Amt. Each Class
149 trees,	8 in. base dia.,	10 feet per tree,	1,490 feet.
255 trees,	9 in. base dia.,	13 feet per tree,	3,315 feet.
598 trees,	10 in. base dia.,	29 feet per tree,	17,342 feet.
615 trees,	11 in. base dia.,	44 feet per tree,	27,060 feet.

Total..... 49,207 feet.

Grand total for pine timber..... 4,317,464 feet.

Computed by the Herring and Davant rule."

III.

That said above scale of timber so cut was of pine timber and was correctly made, and we found that there had been cut from said tract of land by the Village Mills Company 4,317,464 feet of pine timber

(Signed) W. A. McCLELLAND.

(Signed) EUGENE McMAHON.

Sworn to and subscribed before me by each, the said Eugene McMahon and W. A. McClelland, this, the 19th day of February, A. D. 1917.

(SEAL)

(Signed) LULA B. REYNOLDS,

Notary Public in and for Harris County, Texas.

NOTICE ON MOTION.

No. 335.

IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

Houston Oil Company of Texas, Et Al.,
Petitioners,

vs.

Cornelia G. Goodrich, Et Al.,
Respondents.

The Respondents, to-wit:

Cornelia G. Goodrich, a feme sole, Edward L. Montgomery, Jr., Margaret W. Montgomery, a feme sole, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, residents of the Southern Judicial District of the State of New York, or their Attorneys of Record, William D. Gordon and Thomas J. Baten of Beaumont, Jefferson County, in the Eastern Judicial District of Texas;

Fannie M. Allen, a feme sole, Mary M. Steadman, a feme sole, Ophelia M. Cox and husband, Louis L. Cox, residents of the Eastern Judicial District of the State of Kentucky, or their Attorneys of Record, Harrison M. Whitaker and Eugene E. Easterling of Beaumont, Jefferson County, in the Eastern Judicial District of Texas;

William D. Gordon, Thomas J. Baten, Eugene E. Easterling, Harrison M. Whitaker, J. Ben Hooks, Wiley J. Bracken, the Village Mills Company, a corporation of which said J. Ben Hooks is president, and said Thomas J. Baten is vice president, and said Wiley J. Bracken is secretary, all residents of the Eastern Judicial District of the State of Texas;

are hereby notified that the Petitioners, Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, on Monday, March 12, 1917, at the motion hour, or so soon thereafter as the attention of the Court can be obtained, will move the Supreme Court of the United States to grant and issue a rule against you and each of you:

(1) To show cause why you and each of you should not be adjudged in contempt of this Court, and punished therefor, for violating the order of *supersedeas* herein and destroying almost wholly the subject-matter of litigation, by cutting, removing and appropriating the pine timber from the 2578 acres of land involved in this suit and wilfully destroying part of the improvements thereon, which improvements were valuable evidence on behalf of Petitioners herein.

(2) To show cause why you and each of you should not be, in order that the subject-matter of this litigation may be preserved, required to restore to the possession of the Houston Oil Company of Texas, pending final judgment, the 2578-acre tract of land and all improvements thereon involved in this suit, which was in the possession of said Oil Company at the time of the institution of this suit, and why you and each of you should not be restrained and enjoined from going thereon or in any manner using or interfering therewith.

(3) Or, why this Court should not direct the United States Marshal for the Eastern District of Texas, or other proper person, to take possession of said tract of land and improvements thereon, and hold and preserve same pending final judgment herein, and why you and each of you should not be restrained and enjoined from going thereon or in any manner using or interfering therewith.

(4) And why this Court should not grant Petitioners any other appropriate relief, for which Petitioners pray, by holding Respondents in contempt of this Court for, in part, appropriating the subject-matter of the litigation and, in part, destroying the subject-matter of the litigation, and punishing them with suitable punishment, and making such orders as may be found necessary and proper to preserve the subject-matter of the litigation pending final judgment.

A true copy of said motion and affidavits and exhibits, etc., in support of same are hereto attached and delivered to you herewith. A brief in support of said motion is hereto attached and delivered to you herewith, and Respondents are further notified that the Petitioners will file in support of said motion the affidavits and exhibits attached to said motion as aforesaid.

THOMAS M. KENNERLY,

.....
Attorneys for Petitioners, Houston Oil
Company of Texas, Kirby Lumber
Company, and Maryland Trust Com-
pany.

PROOF OF SERVICE OF MOTION, AFFIDAVITS, ETC., IN SUPPORT
THEREOF, AND BRIEF.

No. 335.

IN THE SUPREME COURT OF THE UNITED
STATES.

October Term, 1916.

Houston Oil Company of Texas, Et Al.,
Petitioners,

vs.

Cornelia G. Goodrich, Et Al.,
Respondents.

BEFORE ME, the undersigned authority, on this day personally appeared *H. M. Richter* who, being by me first duly sworn, says on oath that he served the foregoing motion and affidavits, and exhibits attached thereto, and brief in support thereof, upon Respondents in the following manner and upon the following dates, to-wit:

(1) By delivering to

Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica,

a true copy of said motion, exhibits, affidavits, and brief, through *Thos. J. Baten* one of their Attorneys, at *Beaumont, Jefferson* County, Texas, at *8.45 a.m.* on February *24th*, 1917.

(2) By delivering to Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, a true copy of said motion, exhibits, affidavits and brief, through *Harrison M. Whitaker*, one of their Attorneys, at *Beaumont, Jefferson* County, Texas, at *9.15 a.m.* on February *24th*, 1917.

(3) By delivering to William D. Gordon, in person, a true copy of said motion, exhibits, affidavits, and brief, at *Beaumont, Jefferson* County, Texas, at *8.50 a.m.* on February *24th*, 1917.

(4) By delivering to Thomas J. Baten, in person, a true copy of said motion, exhibits, affidavits, and brief,

at *Beaumont, Jefferson* County, Texas, at *8.45* a.m.,
on February *24th*, 1917.

(5) By delivering to Eugene E. Easterling, in person,
a true copy of said motion, exhibits, affidavits, and brief,
at *Beaumont, Jefferson* County, Texas, at *9.30* a.m.,
on February *24th*, 1917.

(6) By delivering to Harrison M. Whitaker, in person,
a true copy of said motion, exhibits, affidavits, and brief,
at *Beaumont, Jefferson* County, Texas, at *9.15* a.m.,
on February *24th*, 1917.

(7) By delivering to J. Ben Hooks, in person, a true
copy of said motion, exhibits, affidavits, and brief, at
Beaumont, Jefferson County, Texas, at *10.50* a.m.
on February *24th*, 1917.

(8) By delivering to Wiley J. Bracken, in person,
a true copy of said motion, exhibits, affidavits, and brief,
at *Beaumont, Jefferson* County, Texas, at *9 a.m.*,
on February *24th*, 1917.

(9) By delivering to J. Ben Hooks, President of the
Village Mills Company, in person; a true copy of said
motion, exhibits, affidavits, and brief, at *Beaumont, Jefferson*
County, Texas, at *10.50* a.m. on February *24th*, 1917.

(10) By delivering to *Geo. C. McYoung*
who is *President & General Manager* of the Texas Builders'
Supply Company, in person, a true copy of said motion,
exhibits, affidavits, and brief, at *Beaumont, Jefferson*
County, Texas, at *10.10* m. on February *24th*, 1917.

H. M. Richter

Sworn to and subscribed before me by said
H. M. Richter this, the *26th*
day of February, A. D. 1917.

Lula B. Reynolds

Notary Public, *Harris* County, Texas.

(Seal)

ADDITIONAL PROOF OF SERVICE OF MOTION, AFFIDAVITS, AND
EXHIBITS IN SUPPORT THEREOF, AND BRIEF.

IN THE SUPREME COURT OF THE UNITED
STATES.

October Term, 1916.

Houston Oil Company of Texas, Et Al.,
Petitioners,

vs.

Cornelia G. Goodrich, Et Al.,
Respondents.

I, Thomas M. Kennerly, one of the Attorneys for Petitioners, Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, do solemnly swear that on the 23 day of February, 1917, I deposited in the United States mail, duly registered, a true copy of the foregoing motion and affidavits and exhibits in support thereof, and brief in support thereof, addressed to the Respondents and each of them, as follows:

- (1) Cornelia G. Goodrich, New York City, N. Y.
Edward L. Montgomery, Jr., New York City,
N. Y.
Margaret W. Montgomery, New York City, N. Y.
Edward L. Montgomery, New York City, N. Y.
Mary W. Montgomery, New York City, N. Y.
- (2) Fannie M. Allen, Frankfort, Kentucky.
Mary M. Steadman, Frankfort, Kentucky.
Ophelia M. Cox, Frankfort, Kentucky.
Louis L. Cox, Frankfort, Kentucky.
- (3) William D. Gordon, Beaumont, Texas.
- (4) Thomas J. Baten, Beaumont, Texas.
- (5) Eugene E. Easterling, Beaumont, Texas.
- (6) Harrison M. Whitaker, Beaumont, Texas.
- (7) Texas Builders' Supply Co., Beaumont, Texas.
- (8) J. Ben Hooks, Kountze, Texas.
- (9) Wiley J. Bracken, Beaumont, Texas.

Helen M. Krasica, New York City, N. Y.
John Krasica New York City, N. Y.

(10) J. Ben Hooks, President of Village Mills Company, Kountze, Texas.

(Signed) THOMAS M. KENNERLY.

Sworn to and subscribed before me by Thomas M. Kennerly, this, the 23 day of February, 1917.

(Signed) LULA B. REYNOLDS,
Notary Public in and for Harris County, Texas.

(Seal)



Supreme Court of the United States

Terming Term, 1901

January 1901

U. S. Supreme Court, 1901

ROBERTSON vs. THE UNITED STATES

CHIEF JUSTICE

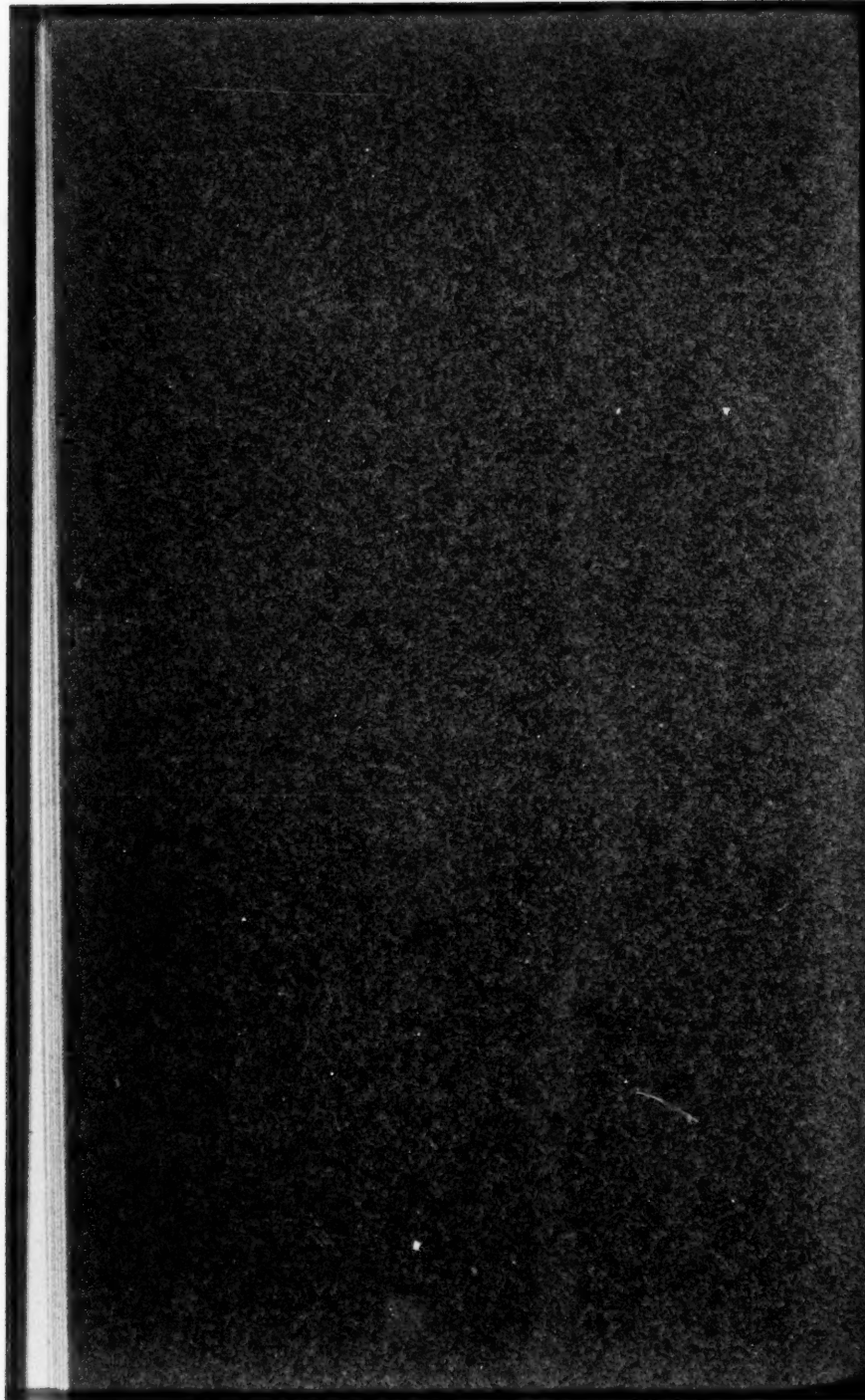
AND THE JUSTICES

OF THE SUPREME COURT

U. S. SUPREME COURT

WASHINGTON, D. C.

1901



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1916.
No. 335.

No. 76 OCTOBER TERM, 1917.

HOUSTON OIL CO. OF TEXAS, ET AL.,
Plaintiffs in Error,

VS.

CORNELIA G. GOODRICH, ET AL.,
Defendants in Error.

**SUPPLEMENTAL BRIEF
FOR PLAINTIFFS IN ERROR.**

In our original brief the various assignments of error, twelve in number, are discussed at length. However, we desire to direct the especial attention of the Court to two questions raised by the first and third specifications of error, for the reason that it seems to us that these specifications go to the heart of this case, and if our contentions in regard to them are sustained, a decision in favor of the plaintiffs in error on the points there raised will be conclusive of the whole case.

As already stated in our original brief, pages 1-4, this was a suit brought by Goodrich, *et al.*, the defendants in error, against the Houston Oil Company of Texas, *et al.*, plaintiffs in error, to recover a tract of land of about twenty-five hundred acres, constituting a part of what was known as the Charles A. Felder League.

This league had been granted to Charles A. Felder by the Government of Mexico prior to the revolution of 1836, and became a part of Liberty County upon the organization of the Republic of Texas. By an Act of January, 1841, a separate County or District designated as Menard County was carved out of Liberty County by the Legislature of Texas, so that this Felder League became a part of Menard County. Subsequently, as a result of further sub-divisions it fell within the territory first of Tyler County and finally of Hardin County.

The Houston Oil Co. of Texas, plaintiff in error, claimed title to this land, not only by virtue of adversary possession under the various Texas statutes of limitations, but under a deed from the said Charles A. Felder to William Daniel, dated June 10th, 1839, which deed was found to have been, on February 23, 1842, recorded and spread upon the records of Menard County. (It is admitted that the land records of Liberty County were destroyed by fire in 1874, so that plaintiffs in error are forced to rely upon circumstantial evidence to prove that it had also been recorded in that County.)

The defendants in error, on the other hand, claim to de-rain title to the same land under a deed from the same Charles A. Felder to a certain John A. Veatch, bearing date eight days later than the deed of Felder to Daniel, above referred to.

At the trial below, the plaintiffs, Goodrich, *et al.*, contended that the said Charles A. Felder had not executed the deed to Daniel of June 10, 1839, and, on the other hand, the defendant, the Houston Oil Company of Texas, disputed the execution of the alleged deed from the said Felder to Veatch of June 18, 1839, alleging that the same was a forgery.

The first vital error committed by the trial Court consisted in refusing to allow the jury to pass upon the question as to whether or not this alleged deed from Felder to Veatch was, or was not, genuine, and in undertaking to hold and adjudge as a matter of law that it was genuine.

Of course, this was the most important question in the case, because inasmuch as the rule obtains in this case, as in

an action of ejectment, that the plaintiff must recover upon the strength of his own title, and the plaintiffs in this case had no claim except such as was based upon this Veatch deed, even if the deed under which the Houston Oil Company claimed, that is, the deed from Felder to Daniel, had not been established, the plaintiffs could not recover, if the jury found that the alleged deed from Felder to Veatch was not genuine.

A special exception was reserved at the trial to the action of the Court in refusing to submit the question of the validity of this deed to the jury in the following terms:

"We except to the charge of the Court in that said charge instructs the jury that the deed from Charles A. Felder to John A. Veatch is established by the evidence, and refusing to submit to the jury the issue of the forgery of said deed." (Record, page 805.)

The same question is raised in the second assignment of error (Record, page 872).

The first question, therefore, is whether or not there was adduced at the trial of this case evidence legally sufficient to have entitled the jury to find as above, that the deed from Felder to Veatch was a forgery.

And the second question is: Was error committed by the refusal of the trial Court to submit to the jury the issue as to whether Charles Felder, on the 10th day of June, 1839, made a deed conveying the land in controversy to William Daniel.

With reference to the William A. Daniel deed, we direct attention to the fact that on the 23rd day of February, 1842, there was recorded at length in Menard County what purports to be a deed from Felder to Daniel conveying this land. This deed defendant in error attacks as a forgery. Even if it be conceded that this record was defective, so that a certified copy would not be admissible as a muniment of title, yet the question would remain, that the fact that such a record existed has been held by numerous decisions in Texas to be admissible in evidence to prove such deed was made and valid, by circumstances. In fact, it has

in effect been held by the Courts of that State, that such a record has sufficient probative force to take a case based thereon to the jury even though not accompanied with other corroborating circumstances. For instance, in the case of *Crain vs. Huntington*, 81 Tex. 614, which involved this identical question, we find this language:

"The fact that a deed answering in every particular to that sought to be established appeared upon the record of deeds of Shelby County is a circumstance tending strongly to show that such a deed was executed."

And the Texas Courts go further and hold that:

"The principle stated holds good, although there be no proof of claim under the deed, the want of other circumstances sustaining the execution of the deed having the effect merely of weakening the probative force of the fact proved by the imperfect record of the deed. The relevancy of such testimony does not hang upon proof of other facts sustaining it. It is so held in *Schultz vs. Lumber Co.*, 82 S. W. 353; *Jones Estate vs. Neal*, 98 S. W. 417."

And in *McCarthy vs. Johnson*, 49 S. W. 1098, it is said:

"But while these instruments were not properly registered, we are of the opinion that the fact of the existence of the record, and what it purported to be, was admissible, under general rules of evidence, as circumstantial evidence tending to prove the existence, genuineness, and contents of the deeds under which plaintiff claimed. When original deeds have been lost, and the parties and subscribing witnesses are dead, so that the direct proof of their execution and contents as originally required cannot be made, parties asserting rights under them are forced to resort to circumstantial evidence to establish them, and it is as legitimate to prove this as any other fact by that character of evidence. In this case the time which has elapsed since the time at which plaintiff sought to prove that these deeds were executed was so great that the witnesses to them are presumed to be dead. * * *

"In a country where titles are expected to be registered the first place where traces of a lost deed are

sought is among the records. If the record of a deed be regular the statute gives to it a certain effect, which it cannot have if it has not been duly made. If it be not regular, it does not follow that its existence may not be a circumstance legally admissible as tending to show that the thing copied, also, had a real existence. Whether it was a genuine document or not is still open for investigation, and that question may be resolved by other circumstances. That such evidence is admissible on such an issue, the following authorities clearly establish: *Allen vs. Read*, 66 Tex. 19; *Winn vs. Paterson*, 9 Pet. 675-676, etc., etc.

"We, therefore, think that the Court should have admitted these records in evidence and submitted to the jury the question as to the execution and contents of the original deeds referred to."

The numerous cases cited in those opinions are also directly in point in holding that where it is sought to establish an alleged lost deed by circumstances, an imperfect record of the kind here involved is admissible in evidence. Here, however, we have the strongest corroborating circumstances. For instance, Daniel stated to Col. Word that he was holding this land in trust for David Brown. (Record, page 325.) As early as 1848 or 1849 the land was sold by the State for taxes assessed against David Brown (Record, page 329), showing that Brown had been claiming the land long enough before that date for his taxes to become delinquent and the necessary proceedings to be taken to subject the land to sale. As early as 1850 (Record, page 323), David Brown's only child was claiming the land under such deed, and a short time thereafter sold it to Word, since which time it has been constantly claimed and taxes rendered and paid thereon by the most honorable and prominent people in Texas. That in 1854 Daniel conveyed the land to Word, the purchaser from Brown's daughter, charging therefor only a nominal consideration, inasmuch as he was only holding it in trust for her. That the records of Liberty County have been burned. It also appears that claim in opposition to such deed has been exceedingly meagre, with long intermissions

under suspicious circumstances, as detailed in our original brief. We thus have the usual evidence relied upon to prove a lost deed, after long (70) years, outside of such imperfect record, and when the fact that such record had existed for this length of time is added to consistent claim thereunder, we are unable to see how it can for a moment be contended that the case is not one for the jury. The trial Judge seems to have given no reason for his ruling, and the Circuit Court of Appeals seems to have considered the ruling as not material, because they considered the evidence that Veatch had notice when he made his alleged purchase from Felder not sufficient to go to the jury. That Court, however, overlooked the fact that if the jury had found that such deed was made plaintiffs in error would have had a clear case under the three years' statute of limitations, which would then have been submitted to the jury; and also overlooked the fact that if the jury had found that such a deed was made, it would have been a strong, if not an overwhelming, circumstance, to show that the alleged deed from Felder to Veatch was a forgery, as it will hardly be contended that Felder would have made a second sale only eight days after the first.

With reference to the purported deed from Felder to Veatch we desire to say that our contention is that in the making of that deed Felder was personated by some other person, and in support of this contention we call attention to the following undisputed facts:

That deed was not signed by the Felder who signed the application upon which the grant was issued, and there is no evidence that such application was signed by other than the true Felder, and this Court in *Williams vs. Conger* has in effect held that defendants in error are estopped from claiming that it was not so signed. The only other explanation therefore is that Felder may have been present and requested some other person to sign his name to the deed, and if so he would be bound thereby. This may be conceded, as a possibility, but when the issue is forgery to be proven by circumstances, the claim that a person who wrote as good a hand as

Felder, would call on some other person to sign his name to as important a document as a deed to a league of land is so unreasonable as to call for the clearest explanation, and the idea that the grantee in such a deed would accept a signature made in that way is almost as unreasonable. A man who writes a good hand *can* call on some one else to sign his name to a deed in his presence, but he never does it in practice. At least, we do not call to mind an instance of that kind. There is no attempt to explain why Felder did it in this instance. We confidently insist that we could stop here, and the Court would not be authorized to take the issue of forgery from the jury. But we do not stop here. In the deed Felder is described as residing in Shelby County and Veatch as residing in Sabine County, and the land was situated in Liberty County, and no explanation is attempted of why they went to Jasper County to make the deed. We explain that if some one was personating Felder he would naturally go where Felder was not known. Again, the witnesses to the Veatch deed wrote good hands, and, if their signatures were not forged, were evidently men of prominence, and yet neither of them had ever been hard of in Jasper County, where the deed was being executed. They, too, were strangers there. Neither the grantor, the grantee, nor the witnesses resided in the county where the land was situated nor in the county where the deed was being made. An unusual combination of circumstances if the transaction was honest but quite natural if a fraud was being perpetrated. Add this to the fact that the purported deed was not signed by Felder.

Again, if the jury had found that the Felder deed to Daniel was genuine it would have been almost conclusive evidence to them that the Veatch deed was not genuine, as it would have been most unreasonable for Felder to have made two deeds so near together. Again, the fact that Veatch sold the land to Morgan so soon after he acquired it is a circumstance the jury would have been entitled to consider. Again, the fact that Morgan's executors filed suit long after Morgan's death against those claiming under the Daniel deed,

to recover the land, and after years of investigation permitted it to be dismissed, would have been a strong circumstance for the consideration of the jury. And when we add to all this the consistent claim under the Daniel deed, as compared with the conduct of those attempting to uphold the Veatch deed, it would seem that instead of instructing a verdict in favor of the Veatch deed, the instruction should have been the other way. The only answer attempted seems to be that Bevil, the officer who took the acknowledgment to the Veatch deed, was an honest man, but this overlooks the fact that he does not state in his certificate of acknowledgment that he was personally acquainted with Felder or any of the other parties, and we have seen they were all probably strangers where the work was being done.

The trial Judge, it is true, commented on Veatch's alleged good character, but he seemed to overlook the fact that this alleged good character in Texas was based upon the testimony of witnesses ranging from six to twelve years of age when they knew him, and that even their testimony shows him to have been a man of limited means, of varied occupations, such as surveyor, mineralogist, some kind of a doctor, who left six motherless children to go into the Mexican War, and on his return married in San Antonio, and left his wife and children there to go to California, the twelve-year-old witness explaining that his wife would not go with him. (Record, page 122).

Of course, if it be held that plaintiffs in error had the right to go to the jury on the issue of the forgery of the purported deed from Felder to Veatch, the judgment must be reversed, as defendants in error claim no other title.

Respectfully submitted,

HEAD, DILLARD, SMITH, MAXEY & HEAD,
PARKER & KENNERLY,

Attorneys for Plaintiffs in Error.

H. O. HEAD,
THOMAS M. KENNERLY,
WM. L. MARBURY,
Of Counsel.

FILED
JAN 3 1916
JAMES D. HAYES

No. 78

IN THE
Supreme Court of the United States

October Term, 1915

HOUSTON OIL COMPANY OF TEXAS, et al.
Petitioners,

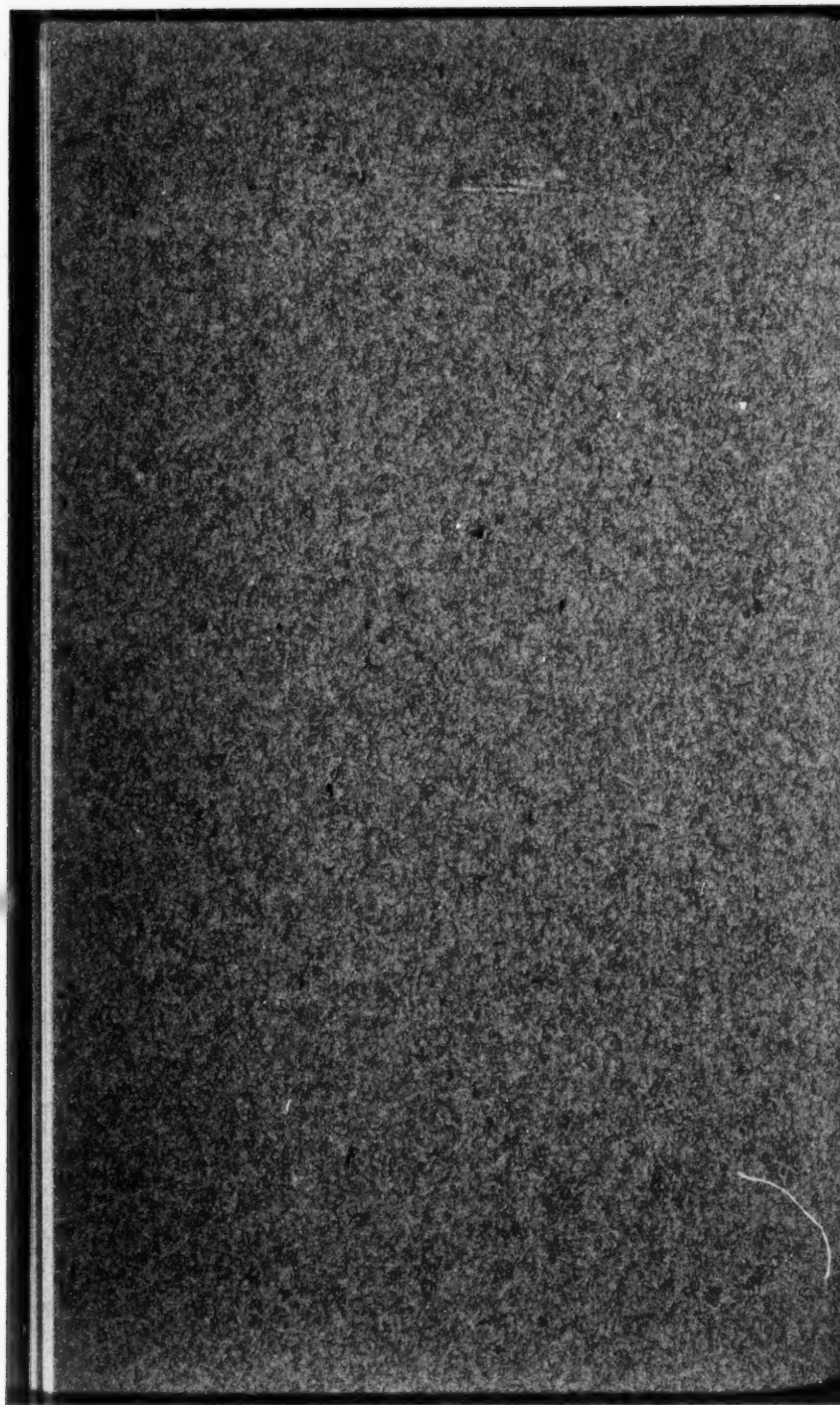
vs.

CORNELLIA G. GOODRICH, et al.
Respondents.

PETITION FOR CERTIORARI AND BRIEF
IN SUPPORT OF SAME

By THOMAS H. BRIDGEMAN,
Attorney for Petitioners.

H. O. REED,
OSWALD G. PARKER,
CARL E. HENNINGLY, of Counsel.



No, _____

**IN THE
Supreme Court of the United States**

October Term, 1915

**HOUSTON OIL COMPANY OF TEXAS, Et AL.,
Petitioners,**

vs.

**CORNELIA G. GOODRICH, Et AL.,
Respondents.**

**PETITION FOR CERTIORARI AND BRIEF
IN SUPPORT OF SAME**

By **THOMAS M. KENNERLY,**
Attorney for Petitioners.

**H. O. HEAD,
OSWALD S. PARKER,
PARKER & KENNERLY, of Counsel.**



SUBJECT INDEX

	Page.
Petition for Certiorari.....	7 to 20
Statement of the Case.....	21 to 30
Specification of Error, and Discussion of Question of Refusal of Trial Court to Submit to the Jury the Issue of Execution of Deed From Charles A. Felder, the Common Source, to William A. Daniel, Under Which Deed Petitioners Deraign Title.....	30 to 66
Specification of Error, and Discussion of Refusal of Trial Court to Submit to the Jury the Issue of whether the Senior Deed From Charles A. Felder, the Common Source, to William A. Daniel, under Which Petitioners Deraign Title, Was Presented for Record to the County Clerk of Liberty County, in Which County the Land Was Situated, Prior to the Execution of the Junior Deed From Charles A. Felder to John A. Veatch, Under Which Respondents Claim.....	66 to 75
Specification of Error, and Discussion of Refusal of the Trial Court to Submit to the Jury the Issue of Whether John A. Veatch, the Junior Purchaser From Charles A. Felder, the Common Source, and Under Whom Respondents Claim, Was a Bona Fide Innocent Purchaser for Value, Without Notice of the Senior Deed From Said Felder to William A. Daniel, Under Which Petitioners Claim	75 to 80

Page.

Specification of Error, and Discussion of Question Whether the Deed Under Which Respondents Claim, From Charles A. Felder, the Common Source, to John A. Veatch, Was in Fact Executed by Said Felder, or Whether Same Was Spurious, and Refusal of Trial Court to Submit That Issue to the Jury	81 to 84
Specification of Error, and Discussion of Question of Whether the Trial Court Should Have Submitted to the Jury the Issue of the Texas Three Year Statute of Limitation, Pleaded and Relied Upon by Petitioners....	84 to 85
Conclusion	85 to 86

LIST OF AUTHORITIES CITED.

	Cited on Page.
Arthur v. Ridge (89 Tex., 15)	65
Act of 1836, Sec. 40 (Laws of Tex., Vol. 1, p. 1216) ..	71
Act of Feb. 5, 1841, p. 119, Sec. 15, P. D., 4622 (Arts. 5672 and 5673)	84
Act of Texas Congress, Sec. 11 (p. 10, Gammel's Laws of Texas)	34
Bamberger v. Schoolfield, 160 U. S., 149; 40 Law. Ed., 374	31
Baldwin v. Goldfrank, 88 Tex., 257	65
Bringinghurst v. Texas Co., 87 S. W., 893	65
Broom's Legal Maxims, p. 949	65
Ballard v. Perry, 28 Tex., 365	72
City & Sub. Ry. v. Svedborg, 194 U. S., 201; 48 Law. Ed., 935	32
Crain v. Huntington, 81 Tex., 614; 17 S. W., 243	52
Delk v. Railroad, 220 U. S., 580; 55 Law. Ed., 590	31
Emanuel v. Gates, 53 Fed., 772	52
Ewing v. Burnett, 11 Pet., 41	85
Fletcher v. Fuller, 120 U. S., 534	62
Frugia v. Trueheart, 106 S. W., 737	64
Fields v. Burnett, 49 T. C. A., 446 108 S. W., 1048 ..	74
Gardner v. Railway, 150 U. S., 349; 37 Law. Ed., 1107	31
Garner v. Lasker, 71 Tex., 431	65
Glascock v. Hughes, 55 Tex., 462	72
Gould v. Day, 94 U. S., 405	72
Hooks v. Colley, 53 S. W., 56	53
Hirsch v. Patton, 108 S. W., 1016	65
Hooper v. Hall, 35 Tex., 85	72

	Cited on Page.
Harrison v. McMurray, 71 Tex., 128; 8 S. W., 612...	74
Holland v. Nance, 102 Tex., 177; 114 S. W., 346.....	77
Kimball v. Houston Oil Co., 100 Tex., 336; 99 S. W., 852	76
League v. Rogan, 59 Tex., 431.....	85
McCarty v. Johnson, 49 S. W., 1098.....	52
Maxson v. Jennings, 48 S. W., 781.....	65
Phoenix Mut. Life Ins. Co. v. Doster, 106 U. S., 30...	30
Parker v. Bains, 65 Tex., 606.....	85
Railway v. James, 163 U. S., 485; 41 Law. Ed., 236...	32
Simmons v. Hewitt, 87 S. W., 188.....	52
Seiling v. Gunderman, 35 Tex., 555.....	74
Stafford v. King, 30 Tex., 259.....	85
Texas Mex. R. R. Co. v. Euribe, 85 Tex., 386; 20 S. W., 153	63
Timmony v. Burns, 42 S. W., 133.....	72
United States v. Chavez, 175 U. S., 520.....	60 and 72
Veatch v. Gray, 91 S. W., 324.....	54
White v. Van Horn, 159 U. S., 3; 40 Law. Ed., 55....	32
Williams v. Talbot, 27 Tex., 160.....	74

No. _____

IN THE
Supreme Court of the United States

October Term, 1915

HOUSTON OIL COMPANY OF TEXAS, Et Al.,
Petitioners,

vs.

CORNELIA G. GOODRICH, Et Al.,
Respondents.

PETITION FOR CERTIORARI

**TO THE HONORABLE SUPREME COURT OF THE
UNITED STATES:**

The Houston Oil Company of Texas and the Kirby Lumber Company, corporations and citizens of the State of Texas, having their domiciles and places of residence in the City of Houston, Harris County, Texas, and the Maryland Trust Company, a corporation and citizen of the State of Maryland, having its domicile and place of residence in the City of Baltimore, and State of Maryland, hereinafter styled PETITIONERS,

complaining of Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, citizens of and having their places of residence in the State of New York, and of Helen M. Krasica and husband, Jean Krasica, citizens of and having their place of residence in the Republic of France, and of Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, citizens of and having their place of residence in the State of Kentucky, and of the Texas Builders Supply Company, a corporation and citizen of the State of Texas, and having its domicile and place of residence in Beaumont, Jefferson County, Texas, submit this, their application for writ of certiorari to review a decision of the Honorable Circuit Court of Appeals for the Fifth Circuit, and file herewith as an exhibit to this petition certified copy of the entire transcript of record in this cause, including the proceedings in the Circuit Court of Appeals, and also file herewith necessary printed copies of said record, and brief in support of this motion, and make, as required by the rules, the following

**SUMMARY -AND SHORT STATEMENT OF THE
MATTERS INVOLVED AND THE GENERAL
REASONS RELIED UPON FOR WRIT
OF CERTIORARI.**

I.

Respondents and Petitioners are citizens and residents of different States, and the jurisdiction of the United States District Court for the Eastern District

of Texas (the Trial Court) attached in this suit by reason thereof **only**, and the judgment of said Circuit Court of Appeals, to which Petitioners prosecuted writ of error to reverse a judgment of the Trial Court in favor of Respondents, is, therefore, final.

II.

The suit, an action at law, was begun by Respondents (**except** the Texas Builders Supply Co.) against Petitioners (**and** the Texas Builders Supply Co.) in Trespass to Try Title and for Damages, under the Texas Statute, to recover title and possession of, and for damages for timber cut and removed, and sand mined and removed, from, the north two thousand, five hundred and seventy-eight (2,578) acres of land out of the Charles A. Felder league, in Hardin County, in said Eastern District of Texas, valued at approximately Twenty-five Dollars (\$25.00) per acre. Petitioners pleaded not guilty, which had the effect under the Texas Statute of putting in issue the title of the parties. They also pleaded the Texas Statute of Limitation of Three, Five and Ten Years. The trial was with a jury in November, 1914, with judgment for Respondents, as stated.

III.

The common source of title is Charles A. Felder, the original grantee from the Government of Coahuila & Texas in 1835. Petitioners claim under **senior** deed from Charles A. Felder to William A. Daniel, dated **June 10, 1839**, and Respondents under **junior** deed from Charles A. Felder to John A. Veatch, dated **June 18**,

1839. Without submitting the issues to the Jury, the Trial Court held that the senior deed to Daniel was not executed and that the junior deed to Veatch was executed by Felder.

IV.

The Petitioners were thus denied the right of trial by jury upon the issue of the execution of the deed from Felder to Daniel, the Trial Court refusing to submit such issue to the jury and holding that the evidence was not sufficient to require such issue to be submitted. Appropriate charges were requested, refused, exceptions saved, and error assigned. The action of the Trial Court was affirmed by the Circuit Court of Appeals, and the error of both Courts is complained of here. The Trial Court admitted evidence offered by Petitioners upon said issue, that:—

Petitioners and their predecessors in title have claimed under this deed since 1839—**more than seventy years.** The claim has been active. In 1850, T. J. Word, a highly respected citizen of Texas, purchased and took deed from Daniel. Word had the land surveyed, placed on the map, and went into possession through several tenants, cut and sold timber therefrom, and paid all taxes. In 1857, Word conveyed an undivided one-half interest to Judge George F. Moore, Chief Justice of the Supreme Court of Texas, the consideration for this, and other tracts being Twenty Thousand Dollars (\$20,000.00). Word's deed to Moore was general warranty. Word and Moore held in the same manner as Word. This continued until 1866.

In 1866, Word conveyed to the wife of Judge Moore, the other half interest, in partition, and Moore con-

tinued to hold and claim for himself and wife as had Word, having tenants on the property, cutting timber, paying all taxes and keeping an agent in the vicinity to look after his interests. This continued until 1881.

In 1881, Judge Moore and wife, by general warranty deed, for a consideration of Thirty Thousand, Eight Hundred and Seven Dollars (\$30,807.00), conveyed this (with other tracts) to Jno. P. Irvin. Irvin, for a large consideration, conveyed a one-half undivided interest to his brother, E. A. Irvin. The Irvins claimed, held, paid all taxes, cut timber, kept agents to ride the lines and police same. This continued until 1891, when they sold to the Texas Pine Land Association, and was continued by it. In 1893, by permission of said Association, a railroad was built onto the property, and immediately a sand pit or mine was opened up on the property. **Since that time and up to the filing of suit it has been operated continuously.** An average of two cars of sand per day has been taken from the land. In the meantime (1901), the Pine Land Association conveyed to the Houston Oil Company of Texas. In connection with the mining of sand, houses were erected for the use of employes, and occupied by them. The timber in the meantime was cut, by the Pine Land Association and the Oil Company and by those claiming under them, and in connection therewith camps and houses were built and occupied. A wood yard was operated on the property for a number of years, supplying wood for the railroad. The railroad, so far as the record discloses, has never acquired either by purchase or condemnation right of way across the property, but has since 1893 operated across same by consent of said Association and said Oil Company. It also continuously

maintained a pumping station and water tank on the property, with a man in charge who resided there. The taxes were paid each year. All of these acts were by virtue of the claim under the Felder to Daniel deed.

The judgment in the Trial Court was in favor of those Respondents who are grandchildren and heirs and devisees of James Morgan. John A. Veatch, the vendee under the junior deed from Felder to Veatch, conveyed in 1841 to James Morgan. Morgan resided in the vicinity of the land until his death in 1866. He paid no taxes, set up no claim, and exercised no ownership, over the land. His children following him doubtless in precept certainly in example did not claim. The active claim under the Daniel deed went unchallenged by Morgan, his children and the rest of human kind until the third generation (Morgan's grandchildren) set up this claim. There was no payment of taxes, claim, acts of ownership by these Respondents (Morgan's grandchildren) from 1866 (when Morgan died) to 1911, when this suit was filed. Nor was there challenge of the title held under the Felder to Daniel deed. The sole and only assertion of claim under the Felder to Veatch deed, during these seventy years, was in 1871, when the Executors of James Morgan sued Judge Moore for the land. They suffered the case to be dismissed for want of prosecution.

Petitioners showed inability to produce, and search for, original deed from Felder to Daniel. The land in 1839 was in Liberty County, Texas. It was agreed that the records of Liberty County were destroyed in 1874, and that the Clerk in office in 1839 is dead. The land was afterwards in Menard County, Texas. The deed

from Felder to Daniel was recorded in Menard County in 1842, where it has remained unchallenged since. The **original Record** was offered and **admitted** in evidence, as a circumstance to prove the execution of the deed in question.

(A **certified copy** under the Texas Statute was excluded. This is referred to in the opinion of the Circuit Court of Appeals, but has no reference to the offer of the Record itself. Or, if it does, the Court does not distinguish between the Record which was **admitted** and the certified copy which was **excluded**.)

There was no testimony attacking the Menard County Record as such. That officers were elected and qualified for Menard County, records for the recording of deeds opened up, and property owners invited and required by Act of the Texas Congress to record their title papers thereon, is not questioned. Later it was held that the Act creating Menard County was invalid, but thereafter the Congress and Legislature of Texas passed validating Acts validating such Records. They are ancient records coming from the custody of the proper officers, recognized by all departments of the State, Legislative, Judicial, and Executive.

There were also offered the Records of Hardin County, where the land is now situated, containing the Felder to Daniel deed, which has been spread thereon many years.

The complaint of Petitioners is that this evidence is sufficient to make the question of the execution of the deed from Felder to Daniel one for the jury, and that it was error to deprive Petitioners of the right to go to the jury thereon. The complaint further is that a deed from Felder to Daniel will be presumed in support of

Petitioners' and their vendors' active claim of nearly three-quarters of a century, and non-claim by Respondents and those under whom they claim.

V.

The Petitioners were also denied the right of trial by jury upon the issue of the presentation of the **senior** deed (Felder to Daniel) under which they claim for record in Liberty County, where the land was then situated, **prior** to the execution of the **junior** deed (Felder to Veatch), under which Respondents claim. The Trial Court refusing to submit that issue to the jury and holding that the evidence was not sufficient to require such issue to be submitted. Appropriate charges were requested, refused, exceptions saved, and error assigned. The action of the Trial Court is apparently affirmed by the Circuit Court of Appeals, and the error of both Courts is complained of here.

It is undisputed that if the senior deed was so presented for record, the junior deed would be of no effect, and Petitioners must prevail. It was agreed that the Records of Liberty County were completely destroyed, when the Court House burned in 1874, and that the custodian of said Records in 1839 is dead. It was shown that both Felder and Daniel, parties to the senior deed, are dead, as well as the witnesses thereto. It was shown that Veatch, the vendee under the junior deed, is dead. Likewise James Morgan, the ancestor of the Respondents, and vendee of Veatch. It was shown that the original Felder to Daniel deed is lost and can not be produced. Petitioners were, therefore, unable, after this lapse of seventy years, to produce any

direct evidence of the date of its presentation for record in Liberty County, and must of necessity rely upon **circumstantial** evidence. It was shown that the Felder to Daniel deed was recorded in every other county in which the land has been situated, to wit, Menard, Tyler, and Hardin, since 1839. It was shown that the county site of Liberty County was only about one day's journey, even at that early date, from the place of execution of the deed. It was shown, as set forth in previous paragraph, men of high character (one the Chief Justice of the Supreme Court of Texas), previous to the destruction of the Liberty County Records, when the true facts were known, bought and sold the property by general warranty deed for large consideration. It was also shown that the Executors of James Morgan (Respondents' ancestor, through whom alone their claim is derived) brought suit for this land against George F. Moore in 1871, when all facts affecting title to the property (except subsequent possession upholding Petitioners' defenses of limitation), appeared of record exactly as at time of the trial of this case, **save for the lone fact that then the records of Liberty County were intact, they having burned in 1874**, and that suit was dismissed for want of prosecution. The long claim under said deed, and non-claim under the junior deed, detailed in Paragraph IV hereof, was shown.

The complaint of Petitioners is that the evidence is sufficient to make the question one for the jury, and that it was error to deprive Petitioners of the right to go to the jury thereon, and further, that it will be presumed in support of the active claim under said deed that it was so presented for record prior to the junior deed.

VI.

The Petitioners were denied the right of trial by jury upon the issue of whether John A. Veatch, the vendee under the junior deed, was a bona fide, innocent purchaser for value of the property, without notice of the senior deed and the title and claim thereunder, the Trial Court refusing to submit such issue to the jury and holding that the evidence was not sufficient to require such issue to be submitted to the jury. Appropriate charges were requested, refused, exceptions saved, and error assigned. The action of the Trial Court was affirmed by the Circuit Court of Appeals, and the error of both Courts is complained of here.

All the parties, both vendor and vendee, all the witnesses, and the officers who took the acknowledgments to both deeds are dead, and were at the time of the trial. Whether Veatch was a bona fide innocent purchaser for value could not be shown upon the trial, more than seventy years after the execution of the deed, by any direct evidence. The rights of the parties under said deeds are controlled by the Acts of 1836 of the Republic of Texas. In construing said Acts the Supreme Court of Texas has held the burden of proof, to show that the vendee under the junior deed was not such bona fide innocent purchaser for value, is upon those holding under senior deed. The same Court has likewise held that such facts may be shown by circumstantial evidence, and that such circumstantial evidence may consist of proof of active claim under the one deed, and non-claim under the other deed. The facts detailed in Paragraphs IV and V hereof were

shown in support of the claim that Veatch was not a bona fide innocent purchaser for value, and that he had notice of the older claim.

The complaint of Petitioners is that the evidence is sufficient to make the issue of whether Veatch was a bona fide innocent purchaser for value, without notice, one for the jury, and that it was error to deprive the Petitioners of the right to go to the jury thereon.

VII.

The Petitioners were denied the right of trial by jury upon the issue of the execution of the deed from Charles A. Felder to John A. Veatch, under which Respondents in the Trial Court claimed. If the deed from Felder to Veatch was not in fact executed, it follows that Respondents can not recover and judgment must go for Petitioners. The facts set forth in Paragraphs IV, V, and VI hereof were offered in support of Petitioners' claim that such deed from Felder to Veatch was a forgery. It was shown that James Morgan, the grandfather of Respondents, was a Commodore in the Navy of the Republic of Texas, and that he lived for twenty-five years in the vicinity of the land in question, during which time the claim under the senior deed from Felder to Daniel was active, and that he never challenged such claim and made no claim himself. It was likewise shown that Morgan died in 1866, and that his children made no claim. His executors, after filing suit for the land, permitted such suit to be dismissed for want of prosecution, but Respondents (Morgan's grandchildren) made no claim until 1911,

when this suit was filed, during all of which time the claim under the Felder to Daniel deed was active, as hereinbefore detailed. In addition, it was shown and practically undisputed that the signature to what purported to be the original deed from Felder to Veatch, was wholly different from the signature of Felder in his application to the Government of Coahuila and Texas for this grant of land. It was shown that no trace upon the records of any county in the vicinity of the land in controversy, and in the vicinity of the place of the alleged execution of the deed from Felder to Veatch, could be found of any person by the name of W. B. Barnett or Samuel Palmer, and no old citizens could be found in that vicinity who had ever heard of any such persons. It was insisted by Petitioners that the deed was spurious and that W. B. Barnett and Samuel Palmer, the alleged witnesses thereto, were fictitious persons.

The complaint of Petitioners is that the evidence is sufficient to make the question of the execution of the deed from Felder to Veatch one for the jury, and that it was error to deprive Petitioners of the right to go to the jury thereon.

VIII.

Petitioners were denied the right of trial by jury upon the issue of limitation under the Texas Statute of Limitation of Three Years, the Trial Court refusing to submit such issue to the jury and holding that the evidence was not sufficient to require such issue to be submitted. Appropriate charges were requested, refused, exceptions saved, and error assigned.

The reason for the refusal by the Trial Court to submit to the jury the issue of the three-year Statute of Limitation doubtless was because of the view of that Court as to the sufficiency of the proof of the senior deed from Felder to Daniel. If the issue of the execution of that deed had been submitted to the jury, and the jury had found that it had been executed, it could hardly be disputed that it would then have been required to submit to the jury the three-year Statute of Limitation. The evidence in support of numerous periods of possession of three years may be found in the Record, and will be pointed out in brief in support hereof rather than prolong this motion by pointing them out here. The Circuit Court of Appeals did not, upon the second appeal, pass upon this question because of its views on the execution of the Felder to Daniel deed.

IX.

In the brief of Petitioners filed herewith the issues and evidence supporting Petitioners' claim are pointed out more fully than in this motion, and said brief is referred to in aid hereof.

X.

Respondents (other than the Texas Builders Supply Company) are represented by W. D. Gordon, Esquire; T. J. Baten, Esquire; H. M. Whittaker, Esquire, and E. E. Easterling, Esquire, Beaumont, Jefferson County, Texas, in the Eastern Judicial District of Texas, who have appeared as their attorneys in the Trial Court and in the Circuit Court of Appeals. The Texas Builders Supply Company is a corporation having its domi-

cile in the City of Beaumont, Jefferson County, Texas, and T. E. Danziger is its Secretary.

WHEREFORE, Petitioners pray that this, their petition for certiorari be granted, that this Court proceed as is provided by law and the rules of the Court in such cases, and that upon final hearing the judgments of the Trial Court and the Circuit Court of Appeals be reversed, and the cause remanded, with the proper instructions for a new trial.

THOMAS M. KENNERLY,
Attorney for the Houston Oil Company of
Texas, Kirby Lumber Company, and
Maryland Trust Company, Petitioners.

H. O. HEAD,
OSWALD S. PARKER,
PARKER & KENNERLY,
Of Counsel.

No. _____

**IN THE
Supreme Court of the United States**

October Term, 1915

**HOUSTON OIL COMPANY OF TEXAS, Et AL.,
Petitioners,**

vs.

**CORNELIA G. GOODRICH, Et AL.,
Respondents.**

**BRIEF IN SUPPORT OF PETITION FOR
CERTIORARI**

STATEMENT OF THE CASE.

I.

The suit involves two thousand, five hundred and seventy-eight (2,578) acres of land out of the Charles A. Felder League (4,428 acres), granted to him under the colonization laws of the State of Coahuila and Texas August 29, 1835, and now situated in Hardin County, in the Eastern Judicial District of Texas.

II.

Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and Jean Krasica were plaintiffs in the Trial Court, their original petition having been filed **June 7, 1911**, in which they claimed **one thousand, seven hundred and twenty-one (1,721) acres** of the land in controversy. When necessary to distinguish these parties from the other respondents, they are referred as to **plaintiffs**.

III.

Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, intervened in this cause **April 1, 1912**, claiming the **entire two thousand, five hundred and seventy-eight (2,578) acres**. When necessary to distinguish these parties from the other respondents, they are referred to as **intervenors**.

IV.

The defendants in the Trial Court were Houston Oil Company of Texas, Kirby Lumber Company, Maryland Trust Company, and the Texas Builders Supply Company.

V.

Thereafter the pleadings were amended so that plaintiffs were seeking to recover the entire two thousand, five hundred and seventy-eight (2,578) acres from **both** defendants and intervenors, and the intervenors

were likewise seeking to recover the entire two thousand, five hundred and seventy-eight (2,578) acres from **both** plaintiffs and defendants. The pleadings of plaintiffs and intervenors were framed under the Texas statute of Trespass to Try Title, the action in the Trial Court being a suit at law. The Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company answered by plea of not guilty and general denial. Under the Texas statute, this put in issue the respective titles of plaintiffs, intervenors and defendants. The Houston Oil Company of Texas also pleaded the Texas Statute of Limitation of three, five, and ten years. The Texas Builders Supply Company pleaded that its rights were deraigned under the Houston Oil Company of Texas, from and through whom it held a contract permitting it to operate a sand pit on the land in controversy and to mine for sand thereon. Both plaintiffs and intervenors prayed for judgment against the Houston Oil Company of Texas and the Texas Builders Supply Company for the value of timber cut and removed and for sand which had been mined from said land. The Houston Oil Company of Texas pleaded the Two Year Statute of Limitation against the plaintiffs and intervenors' recovery for the value of said sand, and the Texas Builders Supply Company prayed that it have judgment over against the Houston Oil Company of Texas for any sum for which judgment was rendered against it, in favor of plaintiffs and intervenors.

VI.

The jurisdiction of the United States District Court for the Eastern District of Texas, in which suit was

filed, and referred to herein as the Trial Court, was by reason only of plaintiffs, intervenors and defendants being residents and citizens of different states.

VII.

The first trial of this cause in the Trial Court was had in November, 1912, with the assistance of a jury, and the Court **refused to submit to the jury the issues arising by reason of the record title from the sovereignty of the soil**, under which defendants (Petitioners) held and claimed, and instructed the jury to return a verdict in favor of plaintiffs and intervenors and against all of the defendants, and rendered judgment in accordance with such verdict, from which the Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company (Petitioners) prosecuted writ of error to the Honorable Circuit Court of Appeals for the Fifth Circuit (the Texas Builders Supply Company refusing to join in said writ of error), and the Circuit Court of Appeals reversed and remanded said cause. (213 Fed., 136.) Thereupon, plaintiffs and intervenors (Respondents) presented a petition for certiorari to this Court, which was denied. (234 U. S., 759-761.)

VIII.

The cause was tried in the Trial Court the second time in November, 1914, upon the same pleadings, and the Court **again refused to submit any issues arising under Petitioners Record title to the jury** and submitted only the issue of whether the defendants (Petitioners) had acquired title under the Texas Five

Year Statute of Limitation. The jury returned a verdict in favor of plaintiffs and intervenors for the land against the Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company upon this one issue, and against the Houston Oil Company of Texas and the Texas Builders Supply Company for the value of the sand taken and mined from said land within two years prior to the filing of the suit (the balance being barred by the Two Year Statute of Limitation). Judgment was rendered on the verdict. Also judgment was rendered over in favor of the Texas Builders Supply Company against the Houston Oil Company of Texas. The Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company again prosecuted writ of error to the Honorable Circuit Court of Appeals for the Fifth Circuit (the Texas Builders Supply Company again refusing to join in the prosecution of said writ of error), and the Circuit Court of Appeals has affirmed the judgment of the Trial Court (226 Fed., 434) and has overruled motion for rehearing filed by the Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company, and said parties are now prosecuting their petition for writ of certiorari to this Court to review the decision of the Circuit Court of Appeals.

IX.

The common source of title is Charles A. Felder, the original grantee from the sovereignty of the soil, and petitioners (defendants in Trial Court) claim under **senior** deed from Charles A. Felder to William A. Daniel, dated **June 10, 1839**. Respondents claim under junior deed from Charles A. Felder to John A. Veatch,

dated **June 18, 1839**. This is a combat, therefore, between such **senior** and **junior** titles.

X.

Petitioners hold and claim under a regular chain of title under such senior deed from Felder to Daniel, not necessary to here detail at length, but which is fully hereinafter set forth, which chain of title consisting of numerous transfers extends over a period of more than seventy years.

XI.

The chain of title of all the respondents is the same down to James Morgan, such chain being:

(a) Charles A. Felder to John A. Veatch, above referred to.

(b) John A. Veatch to James Morgan, dated March 15, 1841.

Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox, and husband, Louis L. Cox (intervenors in Trial Court) are the grandchildren and part of the heirs at law of James Morgan, and are claiming that whatever title passed to Morgan by said deed from Veatch has never passed out of him, and that they are entitled to recover as the heirs of Morgan.

XII.

Cornelia G. Goodrich, et al. (plaintiffs in Trial Court) claim that James Morgan conveyed all the land in controversy to W. W. Swain on November 21, 1844, and

they claim one thousand, seven hundred and forty-one (1,741) acres of the land in controversy under deed out of said Swain.

XIII.

The reason for the issues between plaintiffs and intervenors, as well as between plaintiffs and intervenors on the one hand and defendants on the other, as made by the pleadings and as above detailed, will thus be seen. **However, the plaintiffs and intervenors entered into an agreement, that any recovery by plaintiffs should inure to the benefit of intervenors, and that any recovery by intervenors should inure to the benefit of plaintiffs.**

XIV.

It will be seen, therefore, that the recovery in the Trial Court against the Houston Oil Company of Texas, Maryland Trust Company, and Kirby Lumber Company was, by reason of the rights asserted by intervenors (heirs of James Morgan) and that plaintiffs, Goodrich, et al., were only given a recovery by reason of **such agreement**, it being apparent that the finding of the Trial Court was that whatever title passed to James Morgan by the deed to Veatch above referred to never passed out of him. Had the recovery as against defendants in the Trial Court been by reason of the title of plaintiffs, such recovery could only have been for one thousand, seven hundred and twenty-one (1,721) acres, because plaintiffs only showed title out of Swain (to whom it was claimed that James Morgan had conveyed) to 1,721 acres. **So that the case presented here is as if the heirs of James Morgan alone**

had recovered under the chain of title set forth in Paragraph XI above.

XV.

Ordinarily, under the Texas registration statute, a deed regularly authenticated is admitted in evidence by filing in the cause the original or a certified copy of such instrument three days before the trial and giving notice to the opposite party. But such statute provides that a party relying upon a deed may be required to prove same by some of the methods known to the **common law**, by the opposite party filing as to such instrument a plea of non est factum, technically known as an affidavit of forgery. Such an affidavit was filed against the deed from Felder to Veatch under which respondents claim, and such an affidavit was likewise filed against the deed from Felder to Daniel under which petitioners claim. Such affidavit is under the statute simply a pleading, and not proof, and only has the effect named.

XVI.

The issues presented, therefore, were and are:

(1) Did Charles A. Felder execute the junior (June 18, 1839) deed to John A. Veatch, under which respondents claim? If he did not, respondents (who were plaintiffs and intervenors in the Court below) cannot recover, and it follows that the judgment in their favor should be reversed. And this without regard to whether petitioners have shown title.

(2) If the deed to Veatch was executed, then did

Charles A. Felder execute the senior deed (June 10, 1839) to William A. Daniel, under which petitioners claim? If not, respondents should recover unless petitioners have perfected title under the Texas Statute of Limitation.

(3) If **both** deeds were executed, then under the Act of 1836, in force at that date, the law is:

(a) If the senior deed to Daniel was presented for record to the County Clerk of Liberty County, where the property was then situated, before the execution of the deed to Veatch, the title of petitioners under said senior deed must prevail, and it follows that the judgment below in favor of respondents should be reversed.

(b) If the senior deed to Daniel was not so presented for record, then if Veatch, the purchaser under the junior deed, was not a bona fide innocent purchaser for value, without notice of the claim and title under the senior deed to Daniel, Petitioners claiming under such senior deed, must recover.

(c) The Supreme Court of Texas has held that under said Act of 1836 the burden of proof is upon those holding under the senior title, to show that the purchaser under the junior title was not such bona fide innocent purchaser for value and without notice, **but that such fact may be shown by circumstances, and has held that long, active claim under one title, as against an inactive and dormant claim under the other title, is a strong circumstance to be considered on such issue.**

(4) Petitioners also claim that if the deed from Felder to Daniel is found to have been executed, Peti-

tioners have matured title under the Texas Three Year Statute of Limitation.

XVII.

By appropriate, special requested charges, petitioners sought to have the Trial Court submit each of these issues to the jury, but same were each and all refused, to which exceptions were saved and error assigned.

FIRST SPECIFICATION OF ERROR.

The petitioners (defendants in Trial Court) having shown loss of, and search for, the original deed from Charles A. Felder to William A. Daniel, under which they deraign title, and having offered in evidence the original records of Menard County (which were admitted and read to the jury), showing said deed spread thereon in 1842, where it has since remained unchallenged, and in support of their claim under said deed petitioners having shown payment of taxes, cutting of timber, mining of sand, possession by tenants, and continuous and active claim for MORE THAN SEVENTY YEARS with non-claim upon the part of the respondents and those under whom they claim during said period, such facts were sufficient to entitle petitioners to have the issue of the execution of the deed from Felder to Daniel submitted to the jury, and the Court erred in refusing to so submit it.

The submission of this question was requested in special charge No. 9 (Rec., p. 769), special charge No. 8 (Rec., p. 768). The refusal of these charges is assigned as error, assignments of error No. 10 (Rec., p. 887) and No. 12 (Rec., p. 890).

It seems clear that there is no ground to dispute that petitioners have been deprived of the right of a jury trial guaranteed them by the Constitution. We believe the recognized rule is well stated in *Phoenix Mutual Life Ins. Co. v. Doster* (106 U. S., 30), where it is said:

"The facts and circumstances established by the testimony are sufficiently indicated in the charge of the Court, to certain parts of which, to be presently examined, the Company objected. It is enough to say that the testimony was ample to enable each party to go to the jury upon the substantial issues in the case. The motion, at the close of the plaintiff's evidence, for a peremptory instruction for the Company was properly denied. It could not have been allowed, without usurpation, upon the part of the Court, of the functions of the jury. **Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved.** It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it. *Greenleaf v. Birth*, 9 Pet., 299; *U. S. v. Laub*, 12 Pet., 5; *Weightman v. Washington*, 1 Black, 49; 66 U. S., XVII, 57; *Bank v. Guttschlick*, 14 Pet., 31; *Bevans v. U. S.*, 13 Wall., 62; 80 U. S., XX., 533; *Hendrick v. Lindsay*, 93 U. S.; 146 (XXIII., 856)."

Delk v. Railroad, 220 U. S., 580; 55 Law. Ed., 590;

Bamberger v. Schoolfield, 160 U. S., 149; 40 Law. Ed., 374;

Gardner v. Railway, 150 U. S., 349; 37 Law. Ed., 1107;

City & Sub. Ry. v. Svedborg, 194 U. S., 201; 48 Law. Ed., 935;

Railway v. James, 163 U. S., 485; 41 Law. Ed., 236;

White v. Van Horn, 159 U. S., 3; 40 Law. Ed. 55.

In reaching a conclusion it is, of course, essential that the evidence offered and admitted before the Trial Court be examined and analyzed. We shall do this as briefly as possible.

At the outset, the necessity for the proof of the execution of the deed from Felder to Daniel (dated June 10, 1839), under which petitioners hold this valuable property, and under which petitioners and their vendors have claimed, used and enjoyed same for more than seventy years, is now placed upon petitioners, after all the parties thereto, as well as the witnesses and the authenticating officer, are dead. And after all other persons then residing in the then thinly settled community, who might, by chance, have known of the transaction, have either died or time has dimmed their memories. And this is no fault of petitioners. As will be shown, as early as 1854 and continuously since that time, petitioners and their vendors' title has been **actively, continuously, and persistently** asserted, and it is to the door of respondents that must be laid the charge that the questions now raised were not raised while yet the means of direct proof were open. Respondents, upon whose claim the judgment is based, are grandchildren of James Morgan, a Commodore in the Navy of the Republic of Texas. James Morgan took his deed to this property from John A. Veatch, **March 15, 1841**. James Morgan died in 1866. John A. Veatch died in 1870. That they then had better

opportunities than we now have to know all the facts, including whether the deed from Felder to Daniel was in fact executed, cannot be questioned. No suit was filed by either Veatch or Morgan. Morgan paid no taxes, exercised no acts of ownership, and raised no protest during his life against the claim, occupancy and use of the property by petitioners' predecessors in title. Morgan's children, who were in close and intimate relations with him, made no claim. His executors sued for the land in 1871. The vendors of petitioners, who then claimed under the Daniel deed, met the issue. Depositions were taken by the defense, but the suit was not pressed by such executors and after remaining upon the docket until 1885, it was dismissed for want of prosecution. (Record, pp. 330 and 331.) In 1911 this suit was instituted by the grandchildren of Morgan seventy years after Morgan took deed from Veatch. It is apparent, therefore, that those most familiar with the facts, i. e., Morgan and his children, were impressed that he and they had no title, and made no claim.

Search for the original deed from Felder to Daniel was exhaustive and unavailing. (Testimony of H. M. Richter, Rec., p. 308; Charles T. Butler, Rec., p. 313; Horace Word, Rec., p. 315; J. M. Cook, Rec., p. 332.)

The next step in logical order was the records of Liberty County, where the land was situated at the date of the deed. These records, intact during the lifetime of Morgan and Veatch, were entirely destroyed when the Court House of Liberty County burned in 1874, and the custodian thereof at the time of execution of the deed is dead. (Agreement, Rec., p. 58.)

The next step is the records of Menard County, and the deed is found there recorded, having been spread upon said records in 1842 and remained there since. The Trial Court **excluded a certified copy of the deed**, offered by Petitioners under the Texas Registration Laws. We think the Court erred, the higher Courts of Texas having held the Menard County records valid and certified copies therefrom admissible. Be that as it may, Petitioners, proceeding under the Common Law, brought into Court the **original Menard Records**, in the custody of the County Clerk of Tyler County, their legal custodian, containing the deed from Felder to Daniel. (Rec., pp. 340-342) and **same with such deed so recorded were admitted in evidence**. Bear in mind that the exclusion of the certified copy was not because of any suspicion of the genuineness of the Menard Records, but because of objections to said copy, based entirely on technical construction of the language of certain validating statutes. Menard County was created out of a portion of Liberty County by the Congress of the Republic of Texas and duly organized, a County Clerk elected, and books for recording deeds opened, Courts organized, etc. The Supreme Court of Texas held the manner of its creation contrary to the Constitution. As valuable property rights had arisen by reason of instruments recorded there, such records were validated by Act of the Texas Congress in 1844. (Laws 1844, p. 10; Laws of Texas, Gammel's, Vol. 2, p. 922.)

Section 11 thereof is as follows:

"Sec. 11. Be it further enacted, That all deeds, and other instruments of writing, which have been duly proven before the proper officers of

justice of such districts, or other legal officers, and filed for record with the Clerk of the County Court of said districts shall have, from the time thus filed, the **same legal validity and effect** as if duly proven and recorded in the office of the Clerk of the County Court of Liberty County, saving, however, to judgment creditors and purchasers, without notice, all rights which they may have acquired before the passage of this act."

But the material point is that here was this deed placed of record in 1842, where the Congress of the Republic of Texas directed that it should be recorded, while Felder, the maker, was doubtless still alive; while Daniel was still alive, because Daniel conveys to Word in 1855 (Rec., p. 345); while Veatch, the junior purchaser from Felder, was still alive; while Morgan, Veatch's vendee, was still alive. And all these persons were in the vicinity. If the deed from Felder to Daniel was a forgery and spurious, as contended by respondents, what better opportunity could there have been to so charge in the Courts and community? Yet it was not done. And it was not done until upon the trial of this case, after more than seventy years' active claim under said deed and almost constant and notorious acts of ownership by petitioners and their vendors. And then it was not done by Morgan or his executors or even by his children, but by his grandchildren who make no explanation of the long silence.

The evidence shows that William A. Daniel held and claimed the land for David Brown. That is, while the record title was in Daniel, that David Brown was the real owner. T. J. Word, one of the leading citizens of Texas, and against whom no breath of sus-

picion has ever been uttered, was the purchaser from the sole heir of David Brown and from Daniel, et al.

We quote from Word's testimony as to his purchase of the property in 1850, and his claim and use of the property from 1850 to 1866.

Acts of Ownership, 1850 to 1866.

T. J. Word testified (Rec., p. 322):

"I became acquainted with the locality of the Charles A. Felder League of land in the latter part of the year 1854, in the month of November of that year. The circumstances that induced me to become acquainted with the locality of said league are these: On or about the 31st day of October, 1850, I then being a citizen of Mississippi, I met with Mary E. Brown, the daughter and only heir of David Brown, deceased, at her uncle's, John Smith, in Pontotoc County, Mississippi, and being induced by the said Smith, I joined him in the purchase from the said Mary E. Brown of her interest, real and personal, in the estate of her father, David Brown. In this purchase the Charles A. Felder League was included. In the fall of 1854, I employed surveyor A. N. B. Thompkins, and hired hands, and accompanied them in person to hunt up and survey the lands, thus purchased of Miss Brown. She having before that date intermarried with W. B. Frazier of Sabine or San Augustine. Thompkins commenced surveying at or near King Ratcliff's, about ten miles below Town Bluff, on the Neches River, and continued down the river, surveying the leagues, and about the latter part of the month of November, 1854, we ended our work, and the Charles A. Felder League was the last league we designated and mapped. These are the circumstances which induced me

and the means used to acquire a knowledge of the said league and its location.

"I did as above stated, assert a claim to the said league of land, together with several other leagues, and I purchased in connection with John Smith, as above stated, from Mary E. Brown, now Mary E. Frazier. The purchase was made on 31st Oct., 1850, at and for the sum of six thousand dollars, all of which sum I paid myself to the said Mary E. Brown, now Mary E. Frazier. And in the division of the lands between said Smith and myself the Felder League fell to me. When we were surveying out said lands, as stated above, we found some parties of the name, I think, of Hare, claiming some right to the ferry on the Big Alabama or Village Creek, but they relinquished their claim to me, and I leased the ferry to them, subsequently one of the Ratcliffs managed and controlled the ferry, but set up no claim to the land and recognized me as the owner, and so with all the occupants of the place so far as I know up to the time I sold it. I found also that several other persons had deeds on record for said league. R. O. Lusk had a deed for that league and others that I had bought as stated above. Also W. A. Daniels, but they claimed to hold the same as trustee for said David Brown, and I took deeds from them from Lusk on 5th Oct., 1855, and from Daniel on 5th February, 1855, for that league and others so held by them, some others also seemed to have some sort of claim. But all so far as met with them conveyed to me, this is so far as I can recollect an answer to the third interrogatory.

"From the time I first purchased the land in 1850 up to the time I had the (land) identified and placed on the map in 1854, John Smith had the oversight of them. From November, 1854, up to

the 4th July, 1866, when Mrs. Moore and myself divided and partitioned our lands, all the lands were under my supervision and management. I visited them almost every year, and sometimes two or three times, kept tenants on them, etc., first on my own account, and then for Mrs. Moore and myself, up to the division.

"When, in November, 1854, I first was on the Felder League there, two young men whose names I think was Hare, on said league at the ferry, and were preparing, as they said, to put in a new ferry boat; they said they thought the land was vacant, and intended to put a pre-emption claim on it. Myself and Smith leased it to them for five years, I think, but they soon abandoned it. There was another man by the name of Massey living on or near it, between the ferry and Weiss' Bluff, his house, I think, was on the Montgomery League, but he had surveyed out 320 acres as a pre-emption.

"And a part of the survey ran over the Felder League. I purchased his right to this survey and pre-emption claim, and leased to him."

This lease is dated November 27, 1854, is signed by Asa Massey, witnessed by R. K. Ratcliff, et al., and is found Rec., p. 592.

Continuing, T. J. Word testifies:

"W. Forbs also had a pre-emption survey mostly on the Montgomery League, but ran over on the Felder League, his house and tenth field was on the Montgomery League, and his survey running over on the other. I purchased his pre-emption claim and leased to him for five years. He resided on the place up to the time he moved to Hardin, the county seat, say, some four or five years. I also gave Mr. Callaway the right to cut some tim-

ber off the Felder & Montgomery Leagues, in consideration that he would superintend them and keep off intruders, etc.

"I have answered the substance of this interrogatory in my preceding answers, but I will state farther that there never was at any time from the time I first saw said league of land, up to the time I sold it, and divided with Mrs. Moore, any person on said league of land, except those above stated, Massey, the Hares, and Forbs, living on said league, and none that ever lived on it claimed it or set up any title adverse to mine."

Word conveyed an undivided one-half interest to George F. Moore, Chief Justice of the Supreme Court of Texas. (Rec., p. 374.)

Continuing, Word says:

"I sold an undivided half interest in the Felder League and several other leagues to George F. Moore, on or about the 6th November, 1857, the consideration for all was about eighteen thousand dollars, which he paid me. Subsequently, he directed me to make deed for the same to his wife, Mrs. Susan Moore, which I did, and afterwards, about the 4th July, 1866, upon a division of our lands, I conveyed the Felder League with others to Mrs. Susan Moore in consideration that she conveyed to me other lands, so we divided, and this league fell to her."

Payment of Taxes, 1839 to 1866.

T. J. Word further testifies:

"From 1854 to 1866 I gave in said league of land for the assessment, and paid the taxes regularly, every year prior to that time, I think, in the year 1848, or 1849, this league, together with others, had been sold for the taxes **as the property of David Brown**, and bought in by the State. And in

1857 I redeemed the said league of land from the State by paying the taxes then due, and took the comptroller's receipt, and had it recorded. And so far as I can recollect, the above and foregoing answers embrace all I know about the matters referred to, much time has elapsed, and some things may have slipped my memory, but from memoranda made at the time for the purpose of keeping the matters in my mind, I have stated all."

The deed from Daniel to Word was admitted in evidence. (Rec., p. 345.) Likewise deed from Lusk to Word. (Rec., p. 357.) Also the general warranty deed from Word to Judge George F. Moore (Rec., p. 374), reciting consideration for this and other lands of \$20,000, and conveying a **one-half interest**. The partition deed between Word and George F. Moore and wife was also admitted in evidence. (Rec., p. 374.)

Acts of Ownership, 1866 to 1881.

Judge Moore, of the Texas Supreme Court, vendee of Word, and his wife, Susan Moore, was represented in Hardin County by P. S. Watts (power of attorney, Rec., p. 612), who was authorized to look after the Felder League and other property, and to

" * * * sell and dispose of the timber growing upon said land, upon such terms as he may think to the interest of my said wife, and for me and in my name to demand and receive the rents which may be due, or damages to which myself and wife may be justly entitled from occupants or trespassers upon any of said land; it being understood, however, that no rents are to be demanded from such parties as went into possession and have held possession under title and authority of Colonel Thomas J. Word, of Anderson County, or myself and wife, or under transfers of the possession or

in right of occupancy derived from parties who went into possession as aforesaid, provided they will now make a written acknowledgement and renewal of occupancy under the title of my said wife, and I do by these presents authorize my said attorney to make new leases of said parts and parcels of the same as in his judgment may be reasonable and right."

Elias K. Ward testifies (Rec., p. 599):

That he is 56 years old, and was born and raised in Hardin County. Knows the Felder League since he can recollect, and was raised on it and worked on it since he was a boy. (Rec., pp. 599-600.) That the station Fletcher is on the Felder League. (Rec., p. 602.)

"Q. Did you ever know an old lady, I don't know whether a widow or not, named Mrs. Elizabeth Browning? A. Yes, sir; I was well acquainted with her.

"Q. Where did she live? A. In the same house Chesher lived in; she lived with him.

"Q. There at the place known as Fletcher? A. Yes, sir.

"Q. I will ask you whether or not a man named Judge Watts ever came down there to interview Mrs. Browning in reference to her possession there and cutting timber? A. Yes, sir; I remember that P. S. Watts came down there while I was working there.

"Q. Who did he claim to represent? A. Susan Moore.

"Q. Anybody else? A. No, sir; but I think it was land owned by Word and Moore at the start. I think his rights were from Susan Moore; he was employed by Susan Moore." (Rec., pp. 611 and 612.)

It was during Judge Moore's ownership, claiming as shown under the Daniel deed, and after the death of both James Morgan and of John A. Veatch, that the suit hereinbefore mentioned was filed against him by the executors of James Morgan, but was never prosecuted and was finally dismissed.

Petitioners offered, and there was admitted in evidence, general warranty deed from Judge George F. Moore and wife, Susan Moore, to John P. Irvin, dated August 4, 1881, duly and promptly recorded, and reciting a consideration of \$30,807, conveying the Felder and other surveys.

Acts of Ownership, 1881 to 1891.

John P. Irvin testifies (Rec., pp. 376-377) :

"I have personal knowledge of the Charles A. Felder League in Hardin County, Texas. Have been on it frequently from 1880 to 1890.

"I have a business transaction concerning this survey, buying the same from George F. and Susan Moore, of Austin, Texas, and conveying the same later.

"The conveyance from George F. Moore and Susan Moore was a **bona fide** sale. I purchased the property for its timber value. The sum of money paid George F. and Susan Moore was, I think, the same as consideration in the deed, \$30,807.00."

John P. Irvin conveyed to E. A. Irvin, May 5, 1882.

John P. Irvin, continuing, says (Rec., pp. 377-378) :

"I sold this property as indicated by said records to E. A. Irvin.

"It was a **bona fide** sale, and for the timber value. In the deal with E. A. Irvin there was included besides the Moore lands, other lands, ten to fif-

teen thousand acres. The whole consideration was from \$55,000 to \$60,000. E. A. Irvin furnished the money in cash, and the title was in him. I had a contract from him for a half interest in the same, and some years after, as the records will show, I bought him out entirely."

Irvin, in answer to cross-interrogatory No. 5, says (Rec., p. 380) :

"Consideration paid in cash and in time to meet and cover my obligations for the Moore and other lands conveyed to E. A. Irvin; the transaction was completed in a comparatively short time; and as I mentioned before, E. A. Irvin advanced the money, \$55,000 to \$60,000; and upon my conveying the lands to him, entered into a contract with me by which I had a half interest in the same or in the profits of the same, if operated or sold. Later, some years after, I bought him out bodily of all his interest in Texas. The cash consideration in the deed from myself and wife to E. A. Irvin was \$46,000; this includes the 41,076 acres bought from Moore and wife, August 4, 1881, and also other leagues purchased by me later from the heirs of T. J. Word. The deeds of record will show all these transactions correctly. I may have been mistaken in mentioning the consideration, \$55,000 to \$60,000, through including in my mind other lands, taxes and expenses in my business with E. A. Irvin; but the deeds and records are correct and will show the facts."

E. A. Irvin conveys to John P. Irvin (Rec., p. 375) by "general warranty deed dated December 26, 1889, filed for record in Hardin County, December 26, 1889, and recorded in Book P, pp. 229 to 231, recites a consideration of \$57,872.72, and conveys other land as well as the Felder league."

A. B. Doucette, of Beaumont, says (Rec., pp. 382 to 385):

"Q. Did you represent John P. Irvin as agent or otherwise? A. I became an employe of John P. Irvin in February, 1885. I took the business held by J. J. Copley previous to that.

"Q. What were your duties? A. Well, just to keep the lines open, keep off trespassers off of the land, lease to squatters, if any, sell enough timber to pay the taxes and expenses every year.

"John P. Irvin sold the timber off of the Felder to a man by the name of Perry Sacher, but he lived on the D. C. Montgomery League. This was his place of residence.

"I can remember that Sacher is one man I know of who cut off the Felder and put in timber in about forty different places during five or six years.

"I paid the taxes for Irvin from 1885 until 1894, until it was sold to the Texas Pine Land Association, during that time I think E. A. Irvin probably paid part of the taxes in Tyler County, Jasper and Sabine County, Texas. But I bought all of the necessary scrip that could be bought in that kind of money for Irvin in five counties, Hardin, Jasper, Sabine and Angelina, of course, the Felder being amongst the several leagues in Hardin County; the taxes were paid in bulk as nearly as practicable.

"Q. Were they paid each year they accrued or not? A. Yes, they were.

"Q. Who was on that land when you took charge for John P. Irvin besides the family at the ferry? A. That was all the people I knew.

"Q. Was anybody on it at the time you took charge of the timber you sold to the Texas Pine

Land Association? A. No, there was some young men on the league around the creek during fishing season and in the winter time, they did some trapping in there. Everybody could fish all they wanted to on the creeks.

"Q. Do you know who claimed to be the owner of that league from the time you took the business for John P. Irvin up to the present time; whether they claimed it open or not? A. Irvin bought from Judge Moore and Word at Austin.

"Q. Now, except Judge Moore, John P. Irvin and Word, Texas Pine Land Association and Houston Oil Company of Texas, who, if anyone, within your knowledge has asserted ownership or title? A. No one that I know of except Frank Womack; he set up title to about six hundred and forty acres which lay about three-fourths of a mile east of Cane's Ferry.

"Q. He was sued by the Texas Pine Land Association and defeated, was he not? A. During my time he tried to hold some timber there, but Mr. Irvin stopped him. I would not say whether any compromise was made with him or not.

"Q. Womack, at the time this controversy came up, lived at the ferry, did he? A. He lived at Pine Island, just now known as the town of Voth.

"Q. How far is that from this league? A. It is six or eight miles south of the league.

"Q. Then Womack did not succeed with his claim? A. Not so far as I know.

"Q. What year was it he set up that claim, do you recollect? A. I think it was about 1887 or 1888."

The Irvins (Rec., p. 375) conveyed to the Texas Pine Land Association by general warranty deed the Felder

League and sixteen other tracts for \$334,220, December 11, 1891, duly recorded.

Acts of Ownership, 1891 to Filing Suit.

John H. Kirby testified (Rec., pp. 253 to 288) :

That he was vice-president and general manager of the G., B. & K. C. Railroad prior to 1900; that the stock of same was sold to the Santa Fe (G., C. & S. F. R. R.) in 1900, and the road afterwards merged into the Santa Fe system.

(The Santa Fe was permitted to absorb same by act of the legislature of March 30, 1903, Act 1903, p. 252.)

That he was also Texas representative of the Texas Pine Land Association, which association claimed the land in controversy from the time of its purchase from Irvin in 1891 to its sale to the Houston Oil Company of Texas in 1901.

That the G., B. & K. C. R. R. was built north out of Beaumont in 1893, and crossed Village Creek at a point on the land in controversy in the fall of 1893. That said railroad was built on to the Felder League by, and with the permission of the Texas Pine Land Association. That immediately a sand pit or mine was established on the land in controversy at a point on Village Creek known as Fletcher or Village, and sometimes referred to as Sand Pit F, under a contract between said railroad and the Texas Pine Land Association and sand mined continuously, to his knowledge, up to the time of the sale of the railroad to the Santa Fe, in 1900. The railroad paid the Pine Land Association so much per car for the sand, it being loaded part of the time by

employees of the association, and part of the time by the railroad. As to the quantity of sand taken, we quote his testimony (Rec., p. 257):

"Questioned by Judge Kennerly:

"Q. You say after you had taken the sand off the right-of-way, you made arrangements with the Texas Pine Land Association. How long did it take to get the sand off the right-of-way? A. Two or three months. We had a gumbo district this side of Pine Island Bayou, and put enough sand there to fill the Neches River.

"Q. Where did you get the sand? A. From sand pit at Village Creek.

"Q. That was used to ballast the track from Beaumont north? A. Yes, sir, and some beyond the sand pit, and we used it to fill the yards here in Beaumont out beyond Calder Avenue.

"Q. Do you mean by the yards the place the trains stopped? A. No, sir, we had machine shops and general yards out there for switching purposes.

"Q. I will ask you whether or not the G., B. & K. C. also sold sand for commercial purposes? A. Well, I don't remember exactly; I was not here all the time. Commercial sand was moving all the time, but whether the railroad sold it or the Texas Pine Land Association, I don't know."

That he saw the sand pit daily when he was in Texas, and knew of its continuous operation during the period named. That payments were made each and every month by the Railroad Company to the Pine Land Association for sand. That houses were built by the Pine Land Association for the use of the employees engaged in moving sand, and were occupied by them.

J. E. Withers testified (Rec., pp. 458-474):

That he went to work for the G., B. & K. C. R. R. as a brakeman and all-around man, January 10, 1894. That he had known the property at Fletcher and the sand pit in question since January 14, 1894. That he has worked for the G., B. & K. C. Railroad and the Santa Fe Railroad continuously since that time. That prior to 1895 he was handy-man for these companies, and since 1895 he has been conductor, and mostly passenger conductor. **That he has passed the sand pit every day for at least ten months in each year since 1895.**

Questioned as to whether as much as a month elapsed when sand was not being taken, he said:

"Q. What is your best recollection as to whether it was as much as a month? A. My idea is that there never was as much as a month that sand was not taken out, but I would not swear to it, because we used sand for different purposes.

"Q. What I want is your recollection about it. A. I know we got sand out of there, and the Texas Pine Land Association got sand out of there, and that people got sand out of there for different things. They got sand from there to build mills and furnaces and brick work.

"Q. Did the Texas Pine Land Association get sand there all the time? A. Yes, sir; I guess so.

"Q. Then the G., B. & K. C. got sand for their engines and to ballast the track, and for what other purposes? A. That is about all, for the round-house and track ballast.

"Q. That continued from 1895 up to 1902? A. Yes, sir. And from 1902 to now.

To the same effect was the testimony of T. E. Dan-

ziger (Rec., p. 239) ; R. E. Wall (Rec., 291) ; W. W. Willson (Rec., p. 436) ; W. T. Hooker (Rec., p. 474) ; A. L. Harris (Rec., p. 481) ; Mrs. L. Mattingly (Rec., p. 519) ; Joe Bumstead (Rec., p. 565) ; W. T. Carroll (Rec., p. 685).

It is also shown by these witnesses that some person or persons were residing in the houses on this property practically continuously.

It is undisputed that during the time this property was held by the Texas Pine Land Association all these operations were by it or with its consent.

In 1902, after the sale of the property by the Pine Land Association to the Houston Oil Company of Texas, a contract was made by the Oil Company with the Texas Builders Supply Company, by which the latter company mined sand from said property, and a record was kept of the number of cars (Rec., pp. 242-247) of sand mined therefrom, and payments were made therefor to the Oil Company. It was shown that there were from two to sixty cars per month removed from October, 1902, up to the filing of the suit, or a total of 2,742 cars. By figuring the size of the excavation, it was shown that approximately 6,000 cars were removed from the opening of the pit in 1893 to October, 1902 (Rec., p. 242), or 86,600 cubic yards of sand during the entire period.

In addition to the sand pit, it was shown by the witnesses named that the Pine Land Association had numerous tie camps, for the manufacture of railroad ties from the timber on said property, some of which remained for several years. Residing therein at times were numerous families. Also that for a long period

the Pine Land Association maintained a wood yard on said property from which wood was supplied to the said Railroad Company, said wood being taken from the property in controversy. It was also shown that much timber was cut from time to time by the Oil Company and those claiming under it. It was not shown that said Railroad Company had either, by condemnation or purchase, acquired right of way across the land in controversy, and it was shown that its entry was by consent of the Pine Land Association, and its continuous operation by consent of that Association and its successor, the Houston Oil Company of Texas. It was also shown that said Railroad in 1893 established a water tank and pumping plant on said property, which has been in continuous operation since, its employees who operated same residing on the property in controversy. Such employe most of the time resided some distance from the track and not on what would ordinarily have been the railroad right of way.

It was shown that all taxes were paid by the Pine Land Association and by the Oil Company during the period each held said property, and down to the filing of the suit, and since.

Among the vast number of witnesses who testified as shown by this record, many being engaged in these extensive operations carried on by the Pine Land Association and the Oil Company and their vendors, not one could be found who had ever heard of any claim asserted by Respondents or those under whom they claim, or who had ever been interfered with in their use and enjoyment of this property.

And neither James Morgan (who knew all the facts)

during his lifetime (and he lived in the vicinity of this land for twenty-five years after taking the deed from John A. Veatch), nor his children, nor his Executors, nor the Respondents (his grandchildren), most of whom have lived in Texas for many years, according to this record, ever rendered the property for taxes, paid any taxes, made or attempted to make any use of the land, nor protested against the use made thereof by petitioners for more than seventy years, except the isolated circumstance of the suit by Morgan's Executors above referred to. And this circumstance strengthens rather than weakens petitioners' case, because the suit was abandoned by such Executors and dismissed for want of prosecution. It is not to be supposed that these Executors, acting as they were in a fiduciary capacity, abandoned same without good cause.

There can be no middle ground, the deed from Felder to Daniel under which petitioners assert this long, active claim either was executed by Felder or it was not. If it was not executed, Daniel, Word, and Judge Moore, who claimed under it, knew it, and Veatch and Morgan, who claimed under the junior deed to Veatch, knew it. And it is as difficult for respondents to explain how it was that Daniel, Word and Moore (the last named for many years Chief Justice of the Supreme Court of Texas) would claim under a forged and spurious deed as it is to explain why Morgan never set up such claim during his lifetime and during Veatch's lifetime. And there is no attempt to explain. One of the witnesses whose depositions were taken by respondents (Ellen Lee Mason, Rec., pp. 215-223), a granddaughter of James Morgan, and according to her testimony was his almost constant com-

panion for many years prior to his death, and not only attempts no explanation, but shows conclusively that neither Morgan nor his heirs, so far as she had ever heard, actively claimed the property in this suit.

We believe the evidence of this long, active claim by petitioners, taken with the record of the deed from Felder to Daniel, where it had been for seventy years and more, makes petitioners' position that the issue of the execution of said deed should have gone to the jury unanswerable.

We are not clear whether the expressions found in the opinion of the Circuit Court of Appeals, regarding the Menard records, is intended to apply to both the **record itself which was admitted in evidence** by the Trial Court, and to the **certified copy** of such record which was **excluded** by the Trial Court, or only to the **certified copy**. As there was no complaint from respondents in the Circuit Court of Appeals to the admission of the **record** and without such complaint the action of the Trial Court in admitting it could not be reviewed, and as the decisions of the Texas Courts, and likewise of the Circuit Court of Appeals of the Fifth Circuit are all one way that such a record is admissible, as a circumstance, even though a certified copy thereof may not be, we assume it was only intended to hold the **Certified Copy** not admissible.

Veatch v. Gray, 91 S. W., 324;

Simmons v. Hewitt, 87 S. W., 188;

McCarty v. Johnson, 49 S. W., 1098;

Crain v. Huntington, 81 Tex., 614; 17 S. W., 243;

Emanuel v. Gates, 53 Fed., 772. (A Texas case by C. C. A., Fifth Circuit), in which the Court says, speaking through Judge Pardee:

"These facts and circumstances being in evidence, and the same showing notorious assertion of title and possession under the deed, and the payment of taxes, and that such deed was recorded, it was, in our opinion, clearly admissible to permit the certified copy of the deed in question to go to the jury as **one of the circumstances in the case.** 2 Greenl. Ev., Sec. 558; *Holmes v. Coryell*, 58 Tex., 680; *Brown v. Simpson's Heirs*, 67 Tex., 231; 2 S. W. Rep., 644; *Bounds v. Little*, 75 Tex., 316; 12 S. W. Rep., 1109; *Crain v. Huntington*, 81 Tex., 614; 17 S. W. Rep., 243; *Waggoner v. Alford*, 81 Tex., 366; 16 S. W. Rep., 1083; *Stramler v. Coe*, 15 Tex., 213; *Deen v. Wills*, 21 Tex., 644; *Sowers v. Peterson*, 59 Tex., 220; *Mays v. Moore*, 13 Tex., 88."

If the expressions of the Circuit Court of Appeals is as to the **weight** to be given such record, that is made to depend on the Court's views as to the "**validity**" of such record. In this view there is manifest error. There is no testimony throwing suspicion on the Menard records. In good faith upon the opening of the records of Menard County, this and hundreds of other deeds and other instruments were there recorded, and have remained so recorded unchallenged and undisputed for nearly three-quarters of a century. The Legislative Department recognized them and validated them in and by its Legislative Acts. (See validating Act of 1844, hereinbefore quoted.)

The Courts of Texas have uniformly recognized the Menard records. In the case of *Hooks v. Colley*, 53 S. W., 56 (Texas Court of Civil Appeals), it is said:

"A certified copy of a deed from the original grantee, Cox, to David Brown, of date September 21, 1838, purporting to convey the land in question,

and certified by the County Clerk of Tyler County, was allowed in evidence, over objections of defendants. The question to be considered here is confined to what is raised in appellants' brief. There is but a single proposition presented to us by appellants on this subject, as follows: 'A certified copy of the record of a deed must emanate and come from the proper and legal custodian of that record; and the County Clerk of Liberty County is the proper and legal custodian of the law records of the old judicial district or county of Menard.' It will be seen from this that the objection presented to us is that the copy was not admissible, because it should have been given by the County Clerk of Liberty County. If this particular objection prove untenable—that is, if such clerk was not the legal custodian of such record—the assignment should not be sustained.

"Questions are discussed which to us appear immaterial to this particular question. The territory of Tyler County was detached from Liberty, and organized at an early date; and under Article 674, Rev. St., 1879, if not by force of previous legislation, it was the duty of the County Clerk of Liberty County to deliver any records he had pertaining to Tyler County to the County Clerk of the latter county. The territory of Menard and of Tyler County was the same. Any record relative to this territory was not intended to remain with the Clerk of Liberty County, and such a record book or books as the Record of Deeds of Menard was properly deliverable to the Clerk of Tyler County. It appears to have come into the latter's custody, and presumably this was by delivery from the Clerk of Liberty, in the performance of this duty. Under this state of facts, it must, it seems to us, be held that the County Clerk of Liberty County was not the proper custodian of such rec-

ord in 1898, when the certified copy was issued. This is the only question we have to decide, as the matter is presented by appellant's proposition."

The Trial Judge, for many years a resident of East Texas, recognized that they are the genuine records of Menard County, and in admitting them in evidence, uses this language (Rec., p. 343):

"Gentlemen of the jury, the defendants offer the record book presented by the County Clerk of Tyler County, showing that on the 23rd of February, 1842, there was recorded in what purports to be the records of Menard County an instrument signed by Charles Felder, and witnessed by Charles Clavinger and N. H. Lant, and which purports to have been acknowledged on the 10th of June, 1839, before a man who signs himself as William Myers, Notary Public. The instrument with the certificate of acknowledgement appears from the record offered in evidence to have been recorded in the public records of Menard County on the 23rd of February, 1842. The plaintiffs and intervenors have objected and their objections are overruled and the record book of Menard County from the custody of the County Clerk of Tyler County is allowed to go to the jury, not for the purpose of showing that Charles A. Felder parted with the title to the land, but as a circumstance to be considered by the jury in determining the question as to whether or not Charles A. Felder did deed the land described in that deed to William A. Daniels—that is to say, the court permits you to receive the old record book from Tyler County with the view to taking that and all other circumstances that may be presented to determine whether in point of fact Charles A. Felder did deed the land to Daniels, and for that purpose alone, and it is not to be considered by the jury as a muniment

of title for the land, but as a record permitted to go to the jury to be given by you such weight as you think proper in determining the question of whether Charles A. Felder deeded the land to Daniels."

Afterwards the Trial Judge refused to submit the issue of execution of deed to the jury, but the foregoing reflects his views as to the genuineness of the Menard records.

The officers of the law in Tyler County, whose County Clerk is their custodian, recognize the Menard records. (Testimony Tom Sheffield, Rec., p. 338), where it is said:

"Q. Where do you live? A. In Tyler County.

"Q. You are the County Clerk of Tyler County?
A. Yes, sir.

"Q. What are the records I hand you? A. These are the old Menard County records.

"Q. Where did you get those? A. In Tyler County.

"Q. Where, in Tyler County, out of your office?
A. Yes, sir, at Woodville.

"Q. Are those a portion of the deed records of Tyler County as they exist in your office? A. Yes, sir.

"Q. If you were called upon to exhibit the deed records of Tyler County, would those two books be among your deed records? A. Yes, sir.

"Q. Do you know how long those books have been in the office of the County Clerk of Tyler County? A. No, sir; I do not.

"Q. Were they there when you took charge?
A. Yes, sir.

"Q. Describe the appearance of those books as to age? A. They are old.

"Q. Do they appear to be very old books? A. Yes, sir.

"Q. Do they appear to have been handled a great deal and worn a good deal? A. Yes, sir.

"Q. What is the condition of the paper in the books as to preservation? A. Well, it is worn.

"Q. What is the condition of the ink as to being faded? A. It is faded.

"Q. I will ask you if those old books have ever been transcribed? A. Yes, sir.

"Q. Do you know for what purpose they were transcribed?"

So that it is clear that even if the Circuit Court of Appeals is correct in holding a certified copy not admissible, its expressions regarding the records themselves finds no precedent in the Texas Courts, nor upon the Legislative Enactments of Texas. It cannot be questioned that the records produced are the genuine records of Menard County, and that the Felder to Daniels deed was spread thereon in 1842. This, coupled with the fact that such record was never challenged during the twenty-five years thereafter by John A. Veatch and James Morgan, nor Morgan's children, makes it unanswerable that the deed from Felder to Daniel was executed. Add to this the long, consistent claim under the Daniel deed, and the proof is simply overwhelming.

But if the Menard records and the Felder to Daniel deed thereon be eliminated, petitioners still have sufficient upon which to go to the jury. The last (6th)

paragraph of the opinion of the Circuit Court of Appeals is as follows:

"Much has been said in the argument of the counsel for the plaintiffs in error about the failure of the defendants in error and those under whom they claim to acquire possession of the land during the long period of the existence of the claim which is asserted by the suit. The only statute relied upon, or of which we are aware, other than ordinary statutes of limitation in favor of adverse possessors, which purports to give to a grantee's failure to assert the right to land which a conveyance to him purported to confer the effect of impairing that right in favor of the holder of an inconsistent claim is the one of 1907 above mentioned, the terms of which, as above stated, make it inapplicable to the facts of this case. In the absence of a statute having such an effect, the holder of the legal record title to land, not divested by another's adverse possession for a period sufficient to confer title, or in any other way recognized by law, is not deprived of the right to sue for and recover the land as a consequence of the previous failure of himself or of his predecessors in title to exercise the rights of dominion and possession which the title conferred. The defendants having failed in their attack on the record title relied upon by the plaintiffs, they could not, without sustaining any of the asserted claims to the land sued for which were based upon alleged adverse possession of it for periods sufficient to bar plaintiffs' right to recover, be entitled to hold it as against the plaintiffs because of the previous inactivity of the latter or of their predecessors in title in asserting their rights. In the absence of a statute having such an effect, the age of the record title to land, though unaccom-

panied by possession, does not, except in favor of an adverse possessor, impair the rights it confers on the holder of it, unless it has been divested, or the right to assert it has been lost or barred in some way provided for by law."

It is, of course, conceded that if Veatch, and not Daniel, took title out of Felder, the title still is in those claiming under Veatch unless defeated by limitation in favor of petitioners.

We have never contended that the long nonclaim by respondents, which seems to have impressed the Circuit Court of Appeals as being so unusual, was sufficient to divest title out of Veatch and those claiming under him.

Our claim is and has at all times been that long, active claim of nearly three-quarters of a century of those claiming under the Daniel deed, and nonclaim by those claiming under the Veatch deed, is sufficient to support and require a finding that Veatch never had the title, and Daniel did have the title. And sufficient to require the submission to the jury of the issue of the execution of the Felder to Daniel deed, and the submission to the jury of every other issue necessary to be found to support the active title. Our position and claim further is that if necessary a deed from Felder to Daniel will be presumed in support of the active title, and that every other necessary step and circumstance will be presumed in support of same. And that the authorities, State and Federal, without exception, support this view.

This principle cannot be better expressed than by a quotation from the opinion of this Court, speaking

through Mr. Justice McKenna in *United States v. Chavez* (175 U. S., 522), where it is said:

"It is contended by the Government that no juridical possession is shown under the grant to the southern portion of the tract; that there is no grant shown to Sedillo of the northern portion of the tract; that admitting both are shown, there is no evidence that the title which Don Diego Borrego received in 1734 was conveyed to Clemente Gutierrez, who was shown to have had the possession claiming title in 1785. To infer all these things, it is argued, is to build presumption on presumption, and carry constructive proof too far. The argument is not formidable. The instances mentioned are of the same kind as those in the cited cases, and the principle of the cases is not limited or satisfied by the presumption of only one step in the title. It requires the presumption of all that may be necessary to the repose of the title—to the absolute assurance and quietude of the possession. Quoting the language of the Supreme Court of Tennessee, approved by this court, it assumes that all 'that might lawfully have been done to perfect the legal titles was, in fact, done, and in the form prescribed by law.' And, 'There is hardly a species of act or document, public or private, that will not be presumed in support of possession. Even acts of Parliament may thus be presumed, as also will grants from the Crown.' *Best, Presumptions*, Sec. 109.

"The number of steps presumed does not make the principle different, and whether it would give more strength to rebutting testimony we might be concerned to consider if there was any such testimony.

"We think there can be but one conclusion in the case. The possession of the land began in wrong.

or began in right. If in wrong, it must be shown. The maxims of the law declare the other way. Besides, it is admitted that the pueblo of Isleta has had open and notorious possession as far back as the memory of the oldest living inhabitant can extend, and that it was claimed under the heirs of Clemente Gutierrez, and evidenced by documents which came from the custody and control of the officers who have had them during like memory. Back to Clemente Gutierrez, therefore, a continuous possession is established by admission and by testimony not contradicted. Back beyond the period of living memory, and beyond that period the title needs no inquiry for its validity and repose.

"But there is some documentary evidence coming from a remoter time, and it has been discussed by counsel. We do not think it is necessary to consider it at any length. It consists of the original grant to Antonio Gutierrez, three instruments of conveyance, one reciting the grant to Sedillo, and all asserting ownership and possession of the lands, and an inventory made of the estate of Clemente Gutierrez by the Governor of New Mexico, then an official of Spain. The latter was made a judicial record, and the lands mentioned in it distributed among the heirs. It is to this possession that the appellees trace, as we have seen, and the questions which can arise about it—from whom derived, and the rightfulness or wrongfulness of it—depend upon principles already sufficiently discussed. It is enough to say that Clemente Gutierrez died in possession, and his possession was proof of ownership."

Applying those principles to the facts here. The possession of T. J. Word of the land in controversy herein in 1854 either began in wrong or began in right.

If in wrong, John A. Veatch and James Morgan, the adversely interested parties, who lived for many years thereafter, did not attempt to so show. Likewise the payment of taxes, cutting of timber, possession by tenants, mining of sand, etc., hereinbefore detailed, by Word, Judge Moore, John P. Irvin, Texas Pine Land Association, and Houston Oil Company either was in wrong or in right. If in wrong, it is more than singular that this great length of time has been allowed to lapse, because, as is said by this Court in *Fletcher v. Fuller* (120 U. S., 534) :

"The owners of property, especially if it be valuable and available, do not often allow it to remain in the quiet and unquestioned enjoyment of others. Such a course is not in accordance with the ordinary conduct of men. When, therefore, possession and use are long continued, they create a presumption of lawful origin; that is, that they are founded upon such instruments and proceedings as in law would pass the right to the possession and use of the property. It may be, in point of fact, that permission to occupy and use was given orally, or upon a contract of sale, with promise of a future conveyance, which parties have subsequently neglected to obtain, or the conveyance executed may not have been acknowledged, so as to be recorded, or may have been mislaid or lost. Many circumstances may prevent the execution of a deed of conveyance, to which the occupant of land is entitled, or may lead to its loss after being executed. It is a matter of almost daily experience that reconveyances of property, transferred by the owners upon conditions or trusts, are often delayed after the conditions are performed or the trusts discharged, simply because of the pressure of oth-

er engagements, and a conviction that they can be readily obtained at any time.

"The death of parties may leave in the hands of executors or heirs, papers constituting muniments of title, of the value of which the latter may have no knowledge, and therefore for the preservation and record of which they may take no action; and thus the documents may be deposited in places exposed to decay and destruction. Should they be lost, witnesses of their execution, or of contracts for their execution, may not be readily found, or if found, time may have so impaired their recollection of the transactions that they can only be imperfectly recalled, and, of course imperfectly stated. **The law, in tenderness to the infirmities of human nature, steps in and by reasonable presumptions, that acts to protect one's rights, which might have been done, and in the ordinary course of things, generally would be done, have been done in the particular case under consideration, affords the necessary protection against possible failure to obtain or to preserve the proper muniments of title, and avoids the necessity of relying upon the fallible memory of witnesses, when time may have dimmed their recollection of past transactions, and thus gives peace and quiet to long and uninterrupted possessions.**"

The highest Courts of Texas have sometimes gone even beyond the Federal Courts on this point.

The case of *Texas Mexican R. R. Co. v. Euribe*, 85 T., 386, 20 S. W., 153, is in point. The Supreme Court of Texas, in that case, refers to some of the earlier decisions, which earlier decisions were to the effect that presumption of grant based on long claim, etc., was a presumption of fact for the jury. In the 85th Texas case, however, it is held that where the facts are un-

disputed (as they are in the case at bar), the Court will hold as a matter of law that the title is in the person having such long claim, etc. The opinion is a long one, but a short quotation from it is not out of place, the difficulty encountered being similar to the case at bar, which is the absence of old records.

"The seat of government of the Province and State, to the jurisdiction of which that section of the country had been subject, has been repeatedly changed. Upon the establishment of the independence of Texas, the archives relating to the title in dispute became foreign to our jurisdiction. Under such circumstances, it is not remarkable that the defendants should be unable to produce either the original muniments, nor authentic copies of a title which emanated, if at all, nearly a century and a half ago. It is to such a case that the doctrine of the presumption of a grant is peculiarly applicable, and we are of the opinion that the evidence leads inevitably to the conclusion that there were grants, that the lands in controversy are 'titled,' and were not subject to location. Because the evidence legally admitted required a judgment for the defendant, and the errors of the court were not prejudicial to appellant, the judgment is affirmed."

One of the strongest Texas cases upon this point is the case of *Frugia v. Trueheart*, 106 S. W., 737, Galveston Court of Civil Appeals, in which writ of error was refused by the Supreme Court of Texas. There the rule is laid down that where defendants claim under a lost deed, over 30 years old, and they and those under whom they hold have, during that time, openly and with the acquiescence of plaintiffs, claimed and exercised such acts of ownership as might reasonably be

expected from the owners, and the alleged grantor in the lost deed did not claim ownership, nor did his children during their lifetime, and did not pay taxes on the land, and recitals in instruments and records over 30 years old tend to support defendants' title, the jury may presume the existence of the deed.

To the same effect is *Hirsch v. Patton*, by the same Court, reported in 108 S. W., 1016. See, also:

- Garner v. Lasker*, 71 T., 431;
- Baldwin v. Goldfrank*, 88 T., 257;
- Arthur v. Ridge*, 89 T., 15;
- Maxson v. Jennings*, 48 S. W., 781;
- Bringhurst v. Texas Co.*, 87 S. W., 893.

We take it that no further citation of authority is necessary upon a rule so thoroughly and firmly established, both in the Texas and Federal Courts.

A maxim is: "Lapse of time brings to the aid of all things a presumption of regularity." Also, it has been said:

"No greater obligation lies upon a court of justice than that of supporting a long continued enjoyment by every reasonable presumption."
Broom's Legal Maxims, page 949.

This is but another way of saying that presumption of right follows the long past and continued conduct of the respective opposing claimants, when the controversy arises over the existence of some ancient matter, and the conduct of both has been uniformly consistent with the claim of one, the other claim being meanwhile ignored and apparently abandoned.

This principle alone under the facts in this case ought to be sufficient to require the submission to the jury:

(a) The issue of the execution of deed from Felder to Daniel.

(b) The issue of whether same was presented for record in Liberty County prior to the execution of the deed from Felder to Veatch.

(c) The issue of whether John A. Veatch, the purchaser under the junior deed out of Felder, was a bona fide innocent purchaser for value, etc.

These last two questions we now proceed to discuss.

SECOND SPECIFICATION OF ERROR.

(a) The evidence was sufficient to require the Trial Court to submit to the jury, and to entitle petitioners to have submitted to the jury, the issue of whether the deed from Charles A. Felder to William A. Daniel, dated June 10, 1839, under which petitioners claim, was presented to the County Clerk of Liberty County for record prior to the execution of the deed from Felder to Veatch, dated June 18, 1839, under which respondents claim and the Court erred in not submitting that issue.

(b) Under the evidence, the Trial Court should have, and was required, to presume (and should have so instructed the jury), that said deed from Felder to Daniel was presented for record to the County Clerk of Liberty County before the execution of said deed from Felder to Veatch and erred in not so doing.

This question is presented in requested charges Nos. 1 (Rec., p. 760), 4 (Rec., 763), 5 (Rec., p. 765), 6 (Rec., p. 766), 7 (Rec., p. 767), and in the 1-L (Rec., p. 870), 1-M (Rec., p. 871), and sixth (Rec., 878), seventh (Rec.,

p. 883), eighth (Rec., p. 884), ninth (Rec., p. 886) assignments of error.

It is, of course, undisputed that if the senior deed from Felder to Daniel (under which petitioners claim) was presented to the County Clerk of Liberty County, the county in which this land was then situated, for record prior to the execution of the deed from Felder to Veatch, petitioners claiming under said senior deed must prevail.

It was shown that petitioners have never had in their possession, and could not upon the trial, produce, the **original** deed from Felder to Daniel. The most strenuous search therefor, including within its scope every person who might have been expected to have same, was shown. (Testimony of H. M. Richter, Rec., p. 308; Charles T. Butler, Rec., p. 313; Horace Word, Rec., p. 315; J. M. Cook, Rec., p. 332.

Therefore, the ordinary manner of proving the presentation for record of a deed, i e., by file marks thereon, could not be made. It was agreed that the records of Liberty County were destroyed in 1874, approximately forty years prior to the time of the trial, when the Court House of Liberty County was burned. It was likewise agreed that the County Clerk of Liberty County in 1839 is dead. So that it was manifestly impossible to produce any **direct** evidence that said deed from Felder to Daniel was or was not presented for record prior to the execution of the deed to Veatch. Circumstantial evidence must, therefore, be resorted to. The circumstances tending to show that it was so presented for record were simply overwhelming.

To mention these would be to largely re-state the cir-

cumstances in support of the execution of the deed from Felder to Daniel, which we have discussed under our previous proposition.

In addition to the long, consistent and unchallenged claim of petitioners and their predecessors in title under said deed, there stand out other striking circumstances with much probative force.

Among these is the fact that by reason of the settling up of the country and the organization of new counties, this property was in several different counties; viz., Liberty, Menard, Tyler and Hardin Counties, in the order named, and it was shown that the Felder to Daniel deed was spread upon the records in Menard, Tyler and Hardin Counties. A strong circumstance this is, that if the records of Liberty County had not been without fault of Petitioners, destroyed, the deed would have likewise been found recorded there.

It must be manifest to your Honors that there was some cogent reason why James Morgan, the grandfather of respondents herein, lived for twenty-five years in the vicinity of this valuable tract of land, and paid no taxes thereon, asserted no claim thereto, brought no suit to recover it, and that the active claim, payment of taxes, cutting of timber, and placing of tenants begun in the fifties by those under whom Petitioners claim, went unchallenged by Morgan. Likewise unchallenged by his children, and also unchallenged by his grandchildren (the Respondents herein) for more than forty years after the death of Morgan. Also, that the Executors of Morgan, who filed suit against Judge Moore to recover the land, and who were acting in a fiduciary capacity, suffered the suit to be dismissed

without prosecution. One of the most reasonable explanations that can be offered for this is that the Felder to Daniel deed was presented for record in Liberty County prior to the execution of the Felder to Veatch deed, and that at least Morgan and his children knew that fact and that his Executors discovered that fact, hence did not prosecute the suit.

Bear in mind that while the evidence upon this issue, which must come from the testimony of witnesses, cannot be had on account of the death of the parties to the transactions, witnesses, etc., the **record** evidence that can now be produced is identical with what could have been produced during the lifetime of Morgan, Veatch, Morgan's children, and Morgan's Executors, **save and except the one fact that the Liberty County Records, which would show the date of the recording of the deed from Felder to Daniel, have been destroyed.** This furnishes to our minds a sufficient explanation of why neither Morgan, his children, nor his Executors prosecuted suit to recover this valuable property, and why the Respondents (grandchildren of Morgan), who cannot be as closely in touch with the facts as was Morgan and his children and his Executors, are doing so.

Another strong circumstance in support of the claim of record of the Felder to Daniel deed is, that well-known and eminent citizens of Texas who must have known the facts, claimed thereunder. T. J. Word claimed under the deed; Judge George F. Moore, Chief Justice of the Supreme Court of Texas, claimed under the deed; John P. Irvin, a well-known citizen of Texas, claimed under the deed. They not only claimed, but

they sold and conveyed by general warranty deeds this property for large considerations. They took other people's money in payment for the property and warranted the title thereto. The Record shows that Judge Moore purchased with funds belonging to his wife.

But if the circumstances above pointed out be considered without force, and if the case stands without any evidence that the Felder to Daniel deed was presented for record prior to the execution of the Veatch deed, and without any evidence that it was not, what then are the presumptions? To hold that the presumptions would be that the deed was not so presented for record, would be to indulge a presumption in favor of the nonclaim, it would be to presume in favor of the title of James Morgan, which title he, with knowledge of all the facts, failed for twenty-five years to assert. It would be to indulge a presumption that when James Morgan's executors, after his death, filed a suit for this land and after some testimony was taken, permitted it to be dismissed for want of prosecution, that they, acting in their fiduciary capacity, did not do their duty. It would be to indulge a presumption in favor of the respondents, who themselves have asserted no claim, paid no taxes, nor exercised any acts of ownership for nearly fifty years.

The presumptions must be the other way. It must be presumed in support of the active claim thereunder that the Felder to Daniel deed was presented for record prior to the execution of the Veatch deed. All the authorities support this view. The cases cited and quoted from in our discussion of the previous proposition overwhelmingly support this view.

Section 40 of the Act of 1836, in force at the time of the execution of the two deeds out of Felder, and which would control the matter of the registration, is as follows (Laws of Texas, Vol. 1, p. 1216) :

"Sec. 40. No deed, conveyance, lien, or other instrument of writing, shall take effect as regards the interests and rights of third parties, until the same shall have been duly proven and presented to the court, as required by this act, for the recording of land titles. And it shall be the duty of the Clerk to note particularly the time when such deed, conveyance, lien, or other instrument is presented, and to record them in the order in which they are presented."

In addition, therefore, to the presumptions of its presentation for record which arise in favor of the long, active claim under the Felder to Daniel deed, would be the presumption that Daniel knew the effect of withholding his deed from record, and the presumption that he was a reasonably prudent person, and that knowing the consequence of withholding his deed from the record he would promptly have presented it. The failure to record it forfeited his estate, in the event of a second sale by Felder, to one who, in good faith, paid value and who was without notice of the Daniel deed. The evidence shows the County Site of Liberty County was within a day's journey of the place of the execution of the Felder to Daniels deed, even with the modes of travel necessary to be used at that early day.

We are unable to cite an authority precisely in point where the filing for record of a deed was presumed. If, however, the **execution** of a deed may be presumed after great lapse of time, and from long, consistent,

and undisputed claim, there would seem little difficulty in presuming that such a deed was presented for record where the recording was necessary to its taking full effect. And note particularly the language of Mr. Justice McKenna in *United States v. Chavez* (175 U. S., 520), to the effect that the "number of steps presumed does not make the principle different."

In *Glascoek v. Hughes*, 55 T., 462, a partition was presumed from long claim by a party of a particular portion of a large tract, payment of taxes, etc. In *Gould v. Day*, 94 U. S., page 405, the delivery of a deed was presumed.

In *Timmony v. Burns*, 42 S. W., 133, the San Antonio Court of Civil Appeals held that where a transfer of land is proved to have been executed, that it will be presumed after the lapse of 50 years that it was delivered.

It is also held in *Ballard v. Perry*, 28 T., 365, that where a deed in evidence is a certified copy of the record, that it will be presumed that the notarial seal was on the original, although not indicated on the copy.

In *Hooper v. Hall*, 35 T., 85, it is said:

"On the trial of the cause in the Court below, the defendants offered in evidence a certified copy from the records of Nacogdoches County of a power of attorney from Franklin and E. M. Fuller to Frost Thorn, dated October 14, 1835, and also a certified copy of a deed of the same date from Thorn, as agent of Blossom, to Brookfield, for the land now claimed by appellant. The plaintiff objected to the reading of the instruments in evidence, because the same were copies, and the absence of the originals were unaccounted for; be-

cause the same had not been filed in the cause and notice of such filing given to the plaintiff; because there was no evidence that the originals had been filed in the office of any Alcalde or Judge previous to February, 1837; and because of the insufficiency of the Clerk's certificates to the same. The objections were overruled by the court, and the plaintiff excepted. These instruments appear to have been executed with all the requisite formalities to constitute public or authentic acts, under the laws in force at the date of their execution, and were, therefore, (86) the originals, or protocols, which were to remain in the office of the Alcalde, instead of a record, as provided by the laws now in force. And these acts were by law placed in the custody of the Clerks of the County Courts, who were authorized to certify to copies of the same. They were offered and admitted in evidence under Art. 3717, Pas. Dig., and under the authority of this court in *Hubert v. Bartlett*, 9 Texas, 102; and *Anderson v. Marshall*, 26 Tex., 216, we think properly admitted; nor do we think that the party offering them in evidence should be compelled to first prove that the originals were filed in the Clerk's office prior to February, 1837. In many instances, it would be utterly impossible to make such proof by any living witness; and the file marks on the instruments, if there were any, certified to by the Clerk, could be considered no better proof than a certificate by the Clerk that the instruments were archives in his office, for they could not be archives unless filed at the proper time. And we think the Court would be authorized in presuming that they were filed at the proper time, unless there was proof to rebut that presumption. But this court, in *Hubert v. Bartlett*, says that such an instrument is admissible without filing and notice, on the certificate

of the Clerk, and we see no cause for disapproving that decision."

It is held in *Harrison v. McMurray*, 71 T., 128, 8 S. W., 612, that where it is shown that a duly executed and acknowledged deed was delivered to the Clerk for record, and the recording fee paid, that after the destruction of the Court House and the records, it will be presumed that the Clerk did his duty, and recorded the deed.

The books are full of cases that a power will be presumed, and in Texas the rule has been extended in the case of the surviving husband or wife making sale of the common property for the purpose of paying community debts, to the holding that such debts, after long lapse of time, will be presumed.

In *Seiling v. Gunderman*, 35 T., 555, it is said that what the law requires to be done is presumed to be done until the contrary is shown.

In *Williams v. Talbot*, 27 T., 160, a grant of a league of land from the Government was issued on December 30, 1834. On the same day the grantee executed the title bond conveying said property. It was held that it will be presumed that the title bond was executed after the issuance of the grant.

In *Fields v. Burnett*, 49 T. C. A., 446; 108 S. W., 1048, defendant held under a deed from an administrator. The records of the Probate Court had been destroyed. Defendant had paid taxes on the land for more than 50 years, and plaintiffs, until suit was filed, had never made any effort to enforce their claim to the land. It was held that it will be presumed that every require-

ment of the law as to the validity of the sale had been complied with.

And the decisions of this Court show almost innumerable facts presumed, after long lapse of time, in support of an active title.

THIRD SPECIFICATION OF ERROR.

The evidence was sufficient to entitle petitioners to have submitted to the jury, and to require the Trial Court to submit to the jury, the issue of whether John A. Veatch, the junior purchaser from Felder and under whom respondents claim, was a bona fide innocent purchaser for value, without notice of the senior deed from Felder to Daniel and claim and title thereunder, under which petitioners claim and the court erred in not so doing.

Special charge No. 1 was a requested instruction in favor of the Oil Company, et al. (Rec., p. 760.) Special charges Nos. 10 and 11 (Rec., pp. 770 and 772) submit these issues. See assignment of error No. 1-F, Rec., p. 867; also, assignment of error No. 5 (Rec., p. 876).

If, as we insist in the foregoing proposition, the senior deed from Felder to Daniel was presented for record to the County Clerk of Liberty County before the execution of the junior deed from Felder to Veatch, then further inquiry is unnecessary and judgment must go for petitioners. But if such senior deed was not so presented for record, what then are the relative rights of the parties claiming under the two deeds?

It is the universal rule which needs no citation of

authority to support it, that if the junior purchaser was not a good faith purchaser, or did not pay value, or purchased with notice of the older deed or the claim thereunder, such junior purchaser could not take title. Such is the rule in this instance.

It is the almost universal rule that the burden of proof of such facts is upon the junior purchaser. But the Supreme Court of Texas has held, construing the particular Act of 1836 in force at the date of the execution of these two deeds, that the burden of proof of such fact is upon those who hold under the senior chain of title.

Kimball v. Houston Oil Company of Texas, 100 Tex., 336; 99 S. W., 852.

Applying the rule announced in the Kimball case, above referred to, it would seem that although petitioners, as hereinbefore fully shown, are the holders of the active title to the property in question, that they and those under whom they claim, paying taxes thereon for more than seventy years, and with other acts of ownership extending back for that period, **must now prove that seventy-six years ago, when John A. Veatch purchased this property from Charles A. Felder he was not a bona fide purchaser, did not pay value, and that he had no notice of the older deed from Felder to Daniel.**

At the threshold of the discussion, bear in mind the fact, hereinbefore alluded to, that James Morgan, the grandfather of the respondents, after securing deed from Veatch, lived in the vicinity of this property for twenty-five years or more, during all of which

time John A. Veatch was living and during all of which time the property was being actively claimed, as hereinbefore fully set out by Judge Moore and T. J. Word, under whom petitioners claim, with no protest from Morgan and no effort by him to recover the property. A Court whose aid might have been invoked to settle this question during that period would have found little difficulty in discovering the truth and administering justice. Charles A. Felder knew the facts, John A. Veatch knew the facts, and there is little reason to doubt that James Morgan likewise knew the facts. The witnesses to the Veatch deed, Samuel Palmer and W. B. Barnett (if any such persons existed) in all probability knew the facts, and there is every probability that John Bevil, the Notary Public who, it is claimed took Felder's acknowledgment to the deed to Veatch, also knew them.

But all of these persons are now dead, and have been dead for many years. It is clear, therefore, that no direct evidence can be had upon this question.

The authorities are that whether a junior vendee is a bona fide innocent purchaser for value may be shown by circumstantial evidence like any other fact.

The Circuit Court of Appeals, in Paragraph 3 of its opinion herein, dismisses the question with few words, saving only:

"The evidence was not such as to warrant a finding by the jury that such burden was sustained."

In the case of *Holland v. Nance*, 102 T., 177; 114 S. W., 346, which was a case in which the junior purchaser was seeking to show lack of notice of an older

deed, good faith, and payment of value by circumstantial evidence. In that case the Court says:

"Ordinarily one who seeks to postpone a prior unregistered deed must prove that he paid the purchase money for the land without actual notice of the existence of the prior deed, but this may be established by circumstances. These facts are relied upon to prove the payment of the purchase money. Bragg purchased the land in 1860, from a party who bought it in 1855. The deed from the heirs of Latham to Hargrove was dated in 1854, and was recorded in Madison County in 1856, and payment of the purchase money was acknowledged. Bragg's deed from Hargrove was dated January 25, 1860, and was recorded in Madison County, February 17th, 1860. Payment of the purchase money was acknowledged, and the proof showed that he and those who claimed under him have asserted title to the land from that time down to the time of the trial, paying taxes thereon since 1887, while on the other hand, there had been no record of the antagonistic title, and no assertion of claim by any of the parties under Hoiland, until the 16th day of February, 1903, a few months before the institution of this suit. Bragg is shown to have died twenty years before suit was filed. Nothing appears in the evidence concerning Hargrove. His death might be presumed from the length of time that has elapsed, since the record failed to show any trace of him. We are of opinion that, under such circumstances, a jury might find, as did the Trial Court in this case, that Bragg paid the purchase money when he bought the land, and that he had no notice of the title acquired by the purchase from the administrator of Latham."

And the Circuit Court of Appeals not only appears

to attach no importance to Petitioners' claim (running back nearly three-quarters of a century), and the acts of ownership thereunder, detailed in this record, but likewise attaches no importance to the significant fact above alluded to of the nonclaim upon the part of Respondents and particularly the fact that for some reason which James Morgan carried with him to his grave and which his grandchildren (Respondents herein) do not explain nor seek to explain in this record, Morgan did not see fit to try out this question in the Courts during the lifetime of the persons cognizant of the facts; and the Respondents herein themselves did not see fit to try out the question until more than forty years after the death of Morgan and of the other persons so cognizant of these facts.

Neither does the Circuit Court of Appeals attach any importance, apparently, to the fact that men of the highest character (T. J. Word, and Judge Moore of the Supreme Court of Texas) bought the title under the Daniel deed, paid their money for it, sold it by warranty deed, and that these men lived at a time when it could have been easily ascertained whether Veatch was or was not a bona fide innocent purchaser for value, etc.

The practical effect of the holding of the Circuit Court of Appeals, that the evidence in this case is not sufficient even to require the submission of this issue to the jury, is to say to Respondents, that although you come into Court with a well-grounded suspicion of having waited until time has obliterated the evidence supporting the title of Petitioners to this valuable property, and placed it beyond the powers of Petitioners to

produce any direct evidence to sustain their long and consistent claim of nearly three-quarters of a century, you will be protected and encouraged. And Petitioners and their vendors' long claim avails them nothing and amounts to nothing as a circumstance for a jury to consider in determining the facts.

The Circuit Court of Appeals seems to have been impressed, as indicated in the sixth paragraph of its opinion hereinbefore quoted that the evidence was exceedingly strong indicating an **"abandonment"** of the claim by Respondents, and thereupon proceeds to set forth that such abandonment could not divest the Respondents of title, if those under whom Respondents claim ever had title. No difficulty is found in agreeing that if Veatch ever acquired title under his deed from Felder, it could not be divested by mere abandonment. But we strenuously insist that the evidence of abandonment, which seems to have so impressed the Circuit Court of Appeals is **overwhelmingly sufficient to establish that Veatch was not a bona fide innocent purchaser for value, without notice of the Felder to Daniel deed; that he never, in fact, acquired the title and the abandonment of all claim of title under Veatch evidences recognition of its invalidity and authorizes presumptions against it in favor of the actively asserted title. Such presumptions, if not arising as a matter of law under the unquestioned facts in evidence, were clearly within the province of the jury to deduce from the conduct of the parties and the undisputed facts.**

FOURTH SPECIFICATION OF ERROR.

The Trial Court should have submitted to the jury and allowed the jury to determine whether or not the purported deed from Felder to Veatch, under which respondents claim, was in fact executed by Felder, or was a forgery, and erred in not so doing.

While there are some Texas authorities to the effect that nonclaim by persons deraigning title under a deed is not evidence of the forgery of that deed, we do not believe that such is in accordance with human experience. The evidence is that James Morgan was a Commodore in the Navy of the Republic of Texas. It is insisted by respondents that Morgan would not under any circumstances have claimed under a spurious deed. We are willing to accept this explanation of Morgan's reasons for his failure to claim as hereinbefore pointed out. The same explanation could be made for the Executors of Morgan who brought suit for the land, and refused to prosecute it, and allowed it to be dismissed for want of prosecution.

Much that we have said hereinbefore regarding the activity of the two claims under the two deeds out of Felder applies with equal force to the question of whether or not the deed from Felder to Veatch was ever in fact executed by Felder. But that is by no means all the evidence that was offered to show that the deed from Felder to Veatch was spurious. It has never been seriously contended by Respondents in this case, either upon the first trial, and the first appeal of the case, or upon the second trial and the second appeal, that the person who signed the name Charles A. Felder to the

application to the Government of Coahuila and Texas for the grant of land, likewise signed the deed from Felder to Veatch. A comparison of signatures to the two instruments makes it simply unanswerable that such signatures were not written by the same person.

The Circuit Court of Appeals, in its opinion upon the first appeal of this cause (213 Fed., 139) disposed of the question by saying that it was not necessary for Felder in person to have signed the application for his grant of land, nor was it necessary for Felder in person to have signed the deed to Veatch. Standing without any other evidence, this might have been a reasonable explanation. Upon the second trial of the case, however, Petitioners produced the exact language used in the application of Felder (Rec., pp. 63-64), and it there clearly appears that Felder was present in person and in person signed his application. As to the execution of the deed upon the second trial, Petitioners insisted not only that Felder did not sign the deed to Veatch, but also that the signature to the deed was in the same handwriting as the signatures of the witnesses to the deed, and that all was the handiwork of John A. Veatch, the vendee in the deed. This the jury should have been permitted to settle. Further, it was insisted that Samuel Palmer and W. B. Barnett, whose names appeared as witnesses to the Veatch deed, were fictitious persons, and in support thereof Petitioners caused an examination to be made of the ancient records of every county in East Texas, including the county where this land is situated, as well as the county where it is claimed the deed from Felder to Veatch was executed, and no trace whatsoever could be found of any persons by the name of Samuel Palmer or W. B. Barnett. Further, inquiry

was made of old persons for 100 miles around the place where the deed from Felder to Veatch is claimed to have been executed, and no person could be found who had ever heard of there having lived in the community any such men as W. B. Barnett and Samuel Palmer, the purported witnesses.

The evidence offered by respondents, to the effect that John A. Veatch was a man of good character, referred to his character after he had left Texas, in 1848, and removed to the State of California. None of the California witnesses undertook to testify as to his reputation while in Texas. Two Texas witnesses were produced as to the character of John A. Veatch, both of them were children eight or ten years of age at the time he left Texas. And it was further in evidence that there was a John A. Veatch and a John A. Veitch, the names being pronounced alike, and it was not made clear that the Texas witnesses who testified may not have confused the two men, even if their testimony as to character was entitled to any consideration at all.

Again, the holding of the Trial Court and of the Circuit Court of Appeals, that the evidence was sufficient to show the execution of the junior deed from Felder to Veatch, was based, in part at least, upon the finding that the senior deed from Felder to Daniel had not in fact been executed. And there is nothing to show what would have been the view of the Trial Court, nor of the Circuit Court of Appeals, as to the execution of the Felder to Veatch deed had there been a finding by the jury of the execution of the Felder to Daniel deed. While it is entirely possible that both deeds were in fact executed, there is much to be said in favor of the

view that only one deed was in fact executed. And it could not be said that the jury, if it had found that the deed from Felder to Daniel, under which this long claim has been asserted, was in fact executed, would have likewise found that the deed from Felder to Veatch, under which there has been no assertion of claim, was also executed ten days later.

We insist that with this evidence the Trial Court was not authorized to say that the deed from Felder to Veatch was in fact executed, but that that is a question of fact for the jury, and that the Court should have submitted that issue to the jury.

FIFTH SPECIFICATION OF ERROR.

The evidence was sufficient to entitle the Petitioners to have submitted to the jury the issue of the Texas three-year Statute of Limitation.

The Texas three-year Statute of Limitation is as follows:

"Article 5672 (3340).—Three years possession, when a bar.—Every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not afterward. (Act. Feb. 5, 1841, p. 119, Sec. 15. P. D., 4622.)"

"Art. 5673 (3341).—'Title' and 'color of title' defined.—By the term 'title,' as used in the preceding article, is meant a regular chain of transfer from or under the sovereignty of the soil, and by 'color of title' is meant a consecutive chain of such trans-

fer down to such person in possession, without being regular, as if one or more of the memorials or muniments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of head-right, land warrant or land scrip, with a chain of transfer down to him in possession. (*Id.*, Sec. 15, P. D., 4622.)"

The three-year Statute of Limitation would be applicable only in the event that the Court or jury found that the deed from Felder to Daniel, under which Petitioners claim, was in fact executed.

The numerous periods of three years' possession sufficient to satisfy this statute during the seventy years and more of claim under the Daniel deed, as shown by this Record, we suppose will not be questioned. Our statement of such occupancy and possession under the first proposition herein in itself discloses numerous periods, particularly from 1893 down to the filing of the suit.

Under the authorities, there can be no answer to Petitioners' claim under the three-year statute.

Ewing v. Burnett (11 Peters, 41).

Stafford v. King (30 Texas, 259).

League v. Rogan (59 Texas, 431).

Parker v. Bains (65 Texas, 606).

CONCLUSION.

We do not believe that justice in this case has been reached. Petitioners have been deprived of their right

of trial by Jury on issues which are vital in the upholding of their title, and the long claim thereunder, to this valuable property. We respectfully ask that the judgments of the Circuit Court of Appeals and of the District Court be reversed and the cause remanded for a new trial.

Thomas M. Kennerly
THOMAS M. KENNERLY

Attorney for the Houston Oil Company of
Texas, Kirby Lumber Company, and
Maryland Trust Company.

H. O. HEAD,
OSWALD S. PARKER,
PARKER & KENNERLY,
Of Counsel.

U. S. DISTRICT COURT

FILED

JAN 24 1918

JAMES D. WAHER

No. 76

3876

In The

Supreme Court of the United States.

OCTOBER TERM, 1917.

HOUSTON OIL COMPANY OF TEXAS ET AL.

Petitioners.

VS.

CORDELIA G. GOODRICH ET AL.

Respondents.

SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR CERTIORARI.

THOMAS M. KENNERLY,

*Attorney for Houston Oil Company of
Texas, Kirby Lumber Co., and
Maryland Trust Company.*

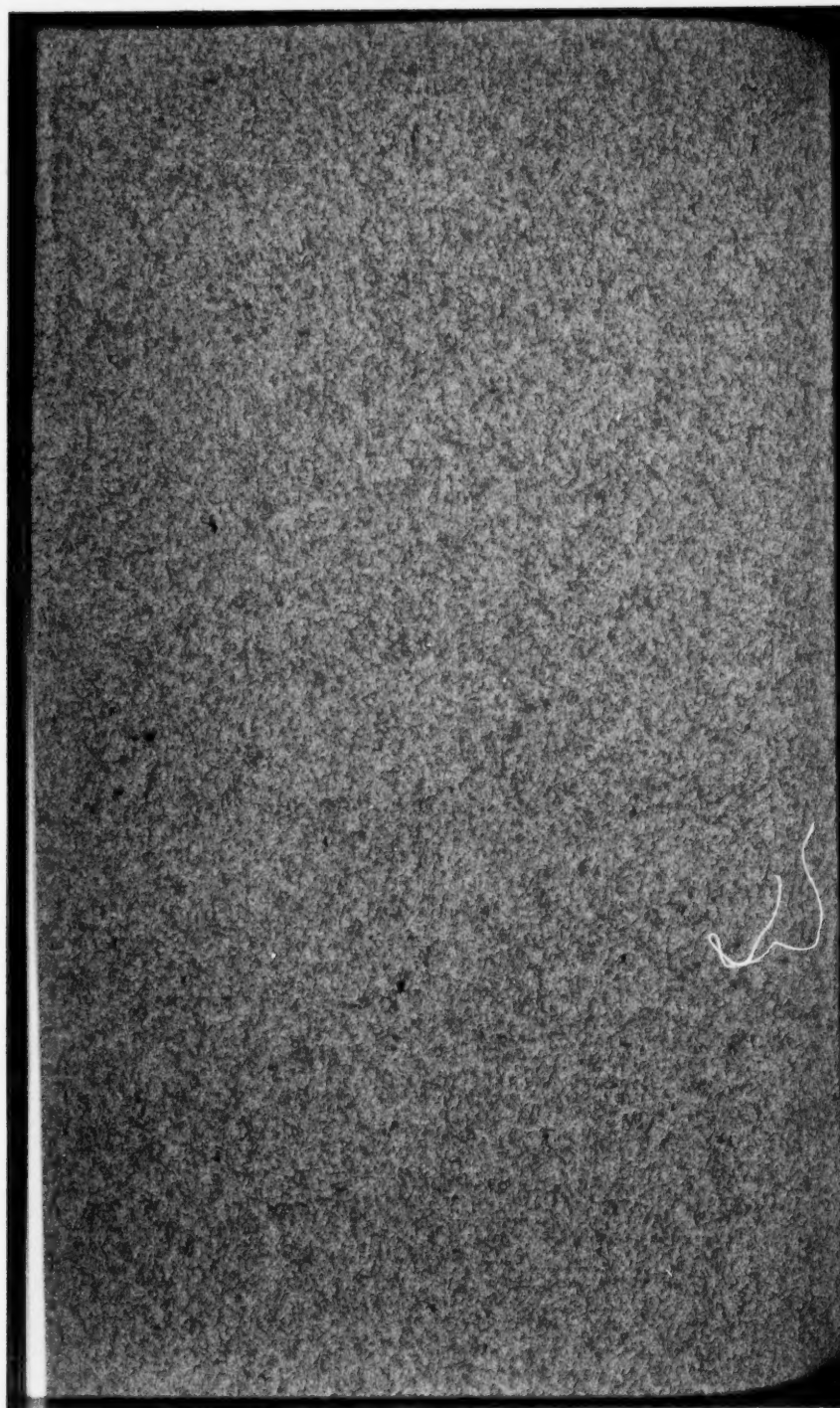
H. O. HEAD,

OSWALD S. PARKER,

WILLIAM L. MARSH,

Of Counsel.

Printed at the U. S. District Court, St. Louis, Mo.



IN THE
Supreme Court of the United States.

OCTOBER TERM, 1915.

HOUSTON OIL COMPANY OF TEXAS ET AL.,
Petitioners,

vs.

CORDELIA G. GOODRICH ET AL.,
Respondents.

**SUPPLEMENTAL BRIEF IN SUPPORT OF
PETITION FOR CERTIORARI.**

If the decision of the Courts below, which this Court is asked to review, on *certiorari*, concerned only the parties to this suit, it might not be deemed of sufficient importance, however erroneous, to justify the granting of the writ.

It is submitted, however, that if found erroneous, it ought to be reviewed and corrected by this Court for the following reasons:

Owing to the flimsy and non-fire-proof character of so many of the buildings—court houses, record offices, etc.,—in which land records are kept in so many of our States, especially in

the South and Southwest, many fires have occurred from time to time resulting in the destruction of these muniments of title.

It is also a fact that the making and placing on record of deeds for lands which the grantor never owned, has been one of the means all too frequently resorted to by land stealers in the past, and more likely to be employed than ever hereafter if this decision should stand unreversed.

Because it is manifest that in a case like this, where the defendant (in an action which is equivalent to an action of ejectment), and its predecessors in title have been in actual possession and undisputed enjoyment of the land for a long period of time, viz., seventy years, claiming under a deed, the execution and recording of which cannot be proven in the usual way by reason of the fact that the land record book in which it has been recorded has been destroyed by fire, and all persons having actual knowledge of its execution and recording are dead, if not permitted to establish the execution and recording of the deed by circumstantial evidence, such as was adduced in this case, are likely in any case to be ousted by a claimant who has a fraudulent deed long junior in date which has been recorded where its record book has not been destroyed.

The character of the circumstantial evidence which was offered for the purpose of proving the execution of the deed under which respondents claim, is indicated on page 36 of our original brief in support of this petition for *certiorari*. This evidence was adjudged by the Court below to be not entitled to go to the jury at all; in other words, legally insufficient, even if believed by the jury to establish the execution of the deed.

It is submitted that upon examination of this evidence, it would appear that it is practically the only kind of evidence which could possibly be available in cases of this kind, and if it is to be disregarded, there will be no security for titles against frauds of the character alluded to.

The evidence offered by respondents to establish the fact that the deed under which it claimed—that is, the deed from Charles A. Felder to William A. Daniel, dated June 10, 1839—was presented to the County Clerk of Liberty County for record prior to the execution of the deed from said Felder to Veatch, dated June 18, 1839, under which respondents claim is indicated on pages 66, 67, etc., of said original brief, and with regard to that evidence we respectfully submit the same proposition.

THOMAS M. KENNERLY,

*Attorney for Houston Oil Company of
Texas, Kirby Lumber Co., and
Maryland Trust Company.*

H. O. HEAD,

OSWALD S. PARKER,

WILLIAM L. MARBURY,

Of Counsel.

No.

733

JAMES D. MAHER
CLERK

Office Supreme Court, U. S.

FILED

MAR 20 1916

IN THE

SUPREME COURT OF THE UNITED STATES

HOUSTON OIL COMPANY OF TEXAS ET AL.,
PETITIONERS,

VS.

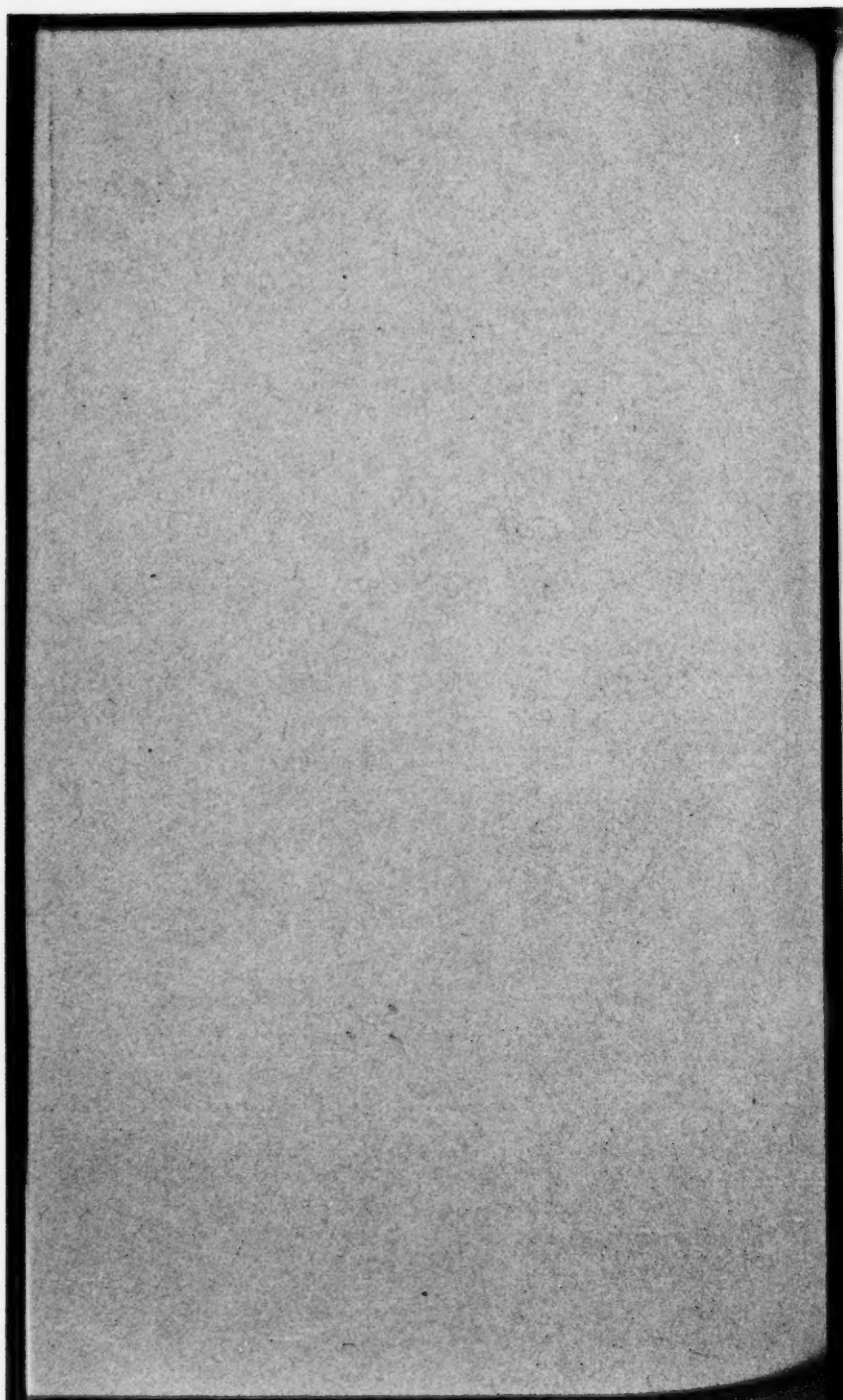
CORNELIA G. GOODRICH ET AL.,
RESPONDENTS.

*Respondents' Rejoinder to Petitioners' Answer
to Motion to Affirm*

WILLIAM D. GORDON,
Attorney for Respondents.

Of Counsel

HARRISON M. WHITAKER,
EUGENE E. EASTERLING,
THOMAS J. BATEN.



SUBJECT INDEX.

	Page.
<i>First Point:</i> Relating to petitioners' claim that there is a public question involved as to the Menard records, but which respondents show is not presented by any specifications of error.....	1-6
<i>Second Point:</i> Relating to the insufficiency of the evidence to submit to the jury the issue of the execution of the purported deed from Chas. A. Felder to Wm. A. Daniel	6-7
<i>Third Point:</i> That the deed from Felder to Veatch under which respondents claim is made superior by the laws of Texas to that from Felder to Daniel even if there were such a deed.....	7
<i>Fourth Point:</i> The evidence was not sufficient to warrant a finding by the jury that Veatch was not a <i>bona fide</i> purchaser for value; nor was there constructive notice to Veatch at the time of his purchase by any record of the deed from Felder to Daniel	7-10
<i>Fifth Point:</i> That William Myers was not a notary public, and if such was not authorized to take acknowledgments to deeds	10-12
Conclusion	12

AUTHORITIES CITED.

	Cited on Page.
Act of 1837, Sec. 11, quoted on p. 9 of Petitioners' Reply	11
Act of 1844, 2 Gammel's Laws, p. 922.....	4
Act of 1836, Sec. 34, Paschal's Dig. Art. 4678; Hart- ley's Dig. Art. 2588.....	11
Act of 1836, Sec. 35, Paschal's Dig., Art. 4973; Hart- ley's Dig. Art. 2752	11
Belcher vs. Fox, 60 Tex. 529, 530.....	7
Hubbard vs. Tod, 171 U. S. 494.....	6
Holmes vs. Coryell, 58 Tex. 688.....	7
Houston Oil Co. vs. Kimball, 103 Tex., 94.....	7
Kimball vs. Houston Oil Co., 100 Tex., 336.....	7
McCelvey vs. Cryer, 28 S. W. 691.....	5
Wilson vs. Simpson, 80 Tex., 279, 283.....	7

No.

IN THE

SUPREME COURT OF THE UNITED STATES

HOUSTON OIL COMPANY OF TEXAS ET AL.,
PETITIONERS,

VS.

CORNELIA G. GOODRICH ET AL.,
RESPONDENTS.

*Respondents' Rejoinder to Petitioners' Answer to Motion
to affirm:*

I.

The motion to affirm the judgment of the court below filed in this case by respondents, is based upon the fact that this court has been imposed upon by a misrepresentation of the true facts of the case as disclosed by the record. We have sustained our motion by numerous references to the record in verification of the statement

made therein. In the reply to our motion counsel for petitioners have failed to point out a single instance wherein any statement made by us is not supported by the record, but content themselves with the assumption "that this court will look to the record to determine whether it has been misrepresented as has been charged." Evidently, then, counsel realize that no legitimate answer can be made to the motion. And so realizing their utter helplessness in the face of the overwhelming facts, they seek, now to distract the attention of this court from the true issues by attempting to inject an issue not raised by any specification or error in their petition for *certiorari*, and by raising a great hue and cry by pretending that a great *public* question is involved affecting the validity of the records of the pseudo County of Menard whereon depends vast property interests "in a territory about as large as the State of Delaware"; and that the Circuit Court of Appeals, by its decision in this case "is contrary to numerous decisions of the higher courts of Texas" and against the recognized opinion of "the Courts and Bar of Texas".

And, seeking to impress this court with the fact that something startling has happened, they say that "they have numerous requests from members of the Bar representing owners of land situated in old Menard County for copies of their brief in this case, and also for copies of their petition for *Certiorari*—in fact, more requests than counsel have been able to supply"; and thereupon they take occasion to incorporate in their reply a copy of a letter from a firm of attorneys which on its face shows that they have been imposed upon and misled (evidently by petitioners' counsel) as to the scope and effect of the decision of the Court of Appeals in this case.

We will add here, by way of parenthesis, that if the petition for *certiorari* was furnished in answer to the numerous requests for it, with the impression in the mind of the inquirers that the decision of the Court of Appeals had, with one fell blow, destroyed the records of the supposed County of Menard, and had thereby undermined the property rights of the clients of these numerous inquirers, then these inquirers must have been grievously disappointed when they found that this question which *now* looms so large in the imagination of counsel is not even raised or presented to this court by any specification of error.

We will not undertake to vie with petitioners' counsel in going out among our brethren of the Bar to get letters and endorsements to allay the great uneasiness which they pretend has been engendered by the decisions of the Court of Appeals in this case. But, if we did so, we would have no difficulty in finding many who would be greatly astonished to hear that any such condition as that conjured up by counsel had resulted from the opinion of the Court of Appeals in this case; or that any legitimate and honest title to the lands in the old County of Menard had been jeopardized. We deny that the decision of the Court disturbs any of these titles. The records of Menard County have been validated and remain intact and undisturbed. We deny that the opinion of the Court of Appeals is contrary to the decisions of the courts of this State. Indeed, so well established are the Menard records, and so recognized, that we know of no other instance arising from those records, where the question decided by the Court of Appeals has been presented to any court in Texas or elsewhere; thus indicating that the decision of the Court of Appeals would apply in the very rarest instances—possibly in no other

than the one here involved. It can be hardly supposed that the inhabitants and officers of Texas were so ignorant or regardless of its laws as to fill the record books of Menard County with copies of instruments proven before officers not authorized to take such proof, as is admittedly the case of the deed now before the court. The Congress of the Republic of Texas in validating the supposed records of the pseudo County of Menard, which had been declared unconstitutional and void, did not undertake to validate any improper or illegal proof or acknowledgment of any instrument spread upon those records, but only made the books of such supposed County records as to those deeds appearing thereon, "which have been *duly* proven before the proper officers of justice of such districts, or other *legal* officers." (See Act quoted on pages 34 and 35 of petition for *certiorari*.) And so the Court of Appeals holds that "the instrument in question did not purport to have been so proven; the acknowledgment of it having been taken before a notary public, an officer who, at the time the deed purported to have been made did not have authority to take acknowledgments of conveyances of land". This is conceded by petitioners' counsel. And the court referring to the validating acts "each validating the record of instruments, which, when they were registered for record, were not entitled to be recorded", says "plainly have reference to instruments found copied in duly authorized books of public record, and not to instruments found copied in a book, such as the Menard County book which was produced, not entitled to recognition as a legal public record, except in so far as such recognition has been provided for by statute." In other words, omit from the laws of the Republic of Texas the act validating the original void records of Menard County, then it must

necessarily follow that no other validating act which may have been passed has had the effect of putting life into these void records. And the only part of these records which were given vitality were such "as have been *duly proven* before the proper officers of justice of such districts, or other legal officers", which excludes from its operation the deed now under consideration purporting to be from Felder to Daniel, because it only purports to be acknowledged before a notary public, an officer not then authorized to take an acknowledgment even if he had been a notary public which the proof in the record denies.

Such decision seems to be very reasonable and indicates nothing new or startling. Indeed petitioners' counsel find no fault with it by any specification of error found in their petition for *certiorari*.

Referring to the act of 1841 with reference to the proof and registry of instruments, Hartley's Dig., Arts. 2776, 2777 in the case of McCelvey vs. Cryer (Tex.), S. W. 691, the court says Art. 2776 "merely validates the registry of deeds made *prior* to the adoption of the act, and then provides" (Art. 2777)" for the registration of instruments '*hereafter* to be made and recorded'. There is no provision validating the acknowledgments of instruments made *anterior* to the passage of the act, the whole object and intent of the law being to render legal the registry of instruments made before the passage of the act, and to provide for the manner of acknowledgment and proof and proper registration of instruments executed after the passage of the act." (Italics ours). The deed in question in this case was not recorded until February 23, 1842, a year after the passage of the act. (R. 342.)

We repeat again that we know of no other instance where this precise question was involved, or where it can arise. And so the great concern of petitioners' counsel that it requires the intervention of this court to prevent the ruin of vast property interests vanishes into thin air even if the question were properly before the court.

We assume, however, that, as stated by Mr. Chief Justice Fuller, in delivering the opinion of the court in the case of *Hubbard vs. Tod*, 171 U. S. 494, the court will confine their "consideration of the case to the examination of errors assigned by petitioners".

II.

But the deed purporting to be from Felder to Daniel was charged by respondents by proper affidavit to be forged (R. 51). This put upon petitioners the burden of proving its execution as at common law. Even though the instrument may be an ancient one, more than thirty years old, it must come from the proper custody, free from suspicion, and must appear to have been in some manner acted on as indicating ownership of the land, before the requirements are fulfilled which make it admissible. And the trial judge must first be satisfied that the requisites have been met before he will admit the instrument in evidence before the jury.

Applying these rules to this instrument what do we find? A copy on a void and irregular record book, true it is an ancient copy, but the original was not produced and therefore no proper custody is shown. Again the instrument was covered with suspicion. Indeed the record of facts shows that its forgery was proven. There is not a scintilla of evidence that it has ever been acted

upon by the grantee, Wm. A. Daniel, or by any one claiming through or under him. And so we see every requisite of the law to the proof of the execution of this instrument was wanting.

This is so held in *Belcher vs. Fox*, 60 Tex. 529, 530, quoted from at length on pp. 11 to 14 of our motion; *Wilson vs. Simpson*, 80 Tex. 279, 283; *Holmes vs. Coryell*, 58 Tex. 688, and many other cases which could be cited.

If petitioners had offered a record or a duly certified copy from such record of a duly acknowledged and recorded deed, still such would not have been admissible without meeting the other requisites laid down by the law as we have noted above, not freeing it from suspicion and without any evidence of corroboration.

III.

But even if what was offered be regarded as legal evidence of the making of the deed from Felder to Daniel, the exclusion of that evidence was error without injury, unless Felder's deed of later date to Veatch, through which respondents title, was in some way deprived of the the precedence which the statutes of Texas gave it as held by the Supreme Court of Texas in *Kimball vs Houston Oil Co.*, 100 Tex. 336 and *Houston Oil Co. vs. Kimball*, 103 Tex. 94. This is so held in this case and the correctness of this ruling is conceded by petitioners.

IV.

To overcome the precedence given to the Felder-Veatch deed by the statutes of Texas, the burden was on the petitioners to prove that the deed from Felder to Veatch was unsupported by a valuable consideration, or that the grantee therein had notice of a prior conveyance by his

grantor. There is not a scintilla of evidence in the case which sustains or tends to sustain such burden.

The adverse and inconsistent title of Felder to Veatch and those subsequent in that chain of title was asserted as clearly appears from the public records, which show sales and conveyances of that claim by successive holders of it, as well as other acts of ownership. The acts and conduct of John A. Veatch to which we should more especially look to determine whether he was a *bona fide* holder for value, were such as to clearly show that he was such. In less than two years after his purchase from Felder, on March 15, 1841 he conveyed this land to Commodore James Morgan, and in the conveyance gave a covenant of general warranty of title, thereby proclaiming as effectually as if he had done so in so many words, that he had a good and perfect title to the land so conveyed. Morgan himself subsequently treats the property as his by several conveyances of it, the last of which was dated only a few months before his death in 1866, and his executors and heirs and those claiming under him have been claiming the land since his death. This we have fully treated in our motion with reference to the record for verification of our statements. Counsel for petitioners seek to escape the effect of Veatch's act in conveying to Morgan and giving a general warranty by saying that "Veatch was leaving the country, and did leave the country" meaning thereby to say to this court that John A. Veatch upon making the deed to Morgan immediately left the country and ran away. This is on a par with many other statements counsel in desperation make. The record in this case shows that Veatch remained in Texas, became a soldier in the service of his country and an officer in the U. S. Army in the war with Mexico in 1846, and that having faithfully performed his

duty, "in the days of '49" went to California, where and in Oregon, he lived until his death honored and respected by all who knew him, as he had been in Texas, as an honest and upright man. Does such conduct indicate any running away after making a deed in 1841? But petitioners say that Veatch had constructive notice of the conveyance from Felder to Daniel because of its record in Liberty County prior to his purchase from Felder. At least they say that the question as to whether it was so recorded should have been submitted to the jury. In our motion we have shown not only that there is not a scintilla of evidence tending to show that this deed was ever recorded in Liberty County, but on the contrary the evidence shows conclusively that it was not so recorded. But, if it had been so recorded, such record would not have imparted constructive notice to Veatch, because it was an invalid and improper record. Because (a) Williams Myers was not a Notary Public, and (b) if he had been, he was not authorized to take an acknowledgment to a deed in 1839 as is indisputably shown in our motion by reference to the statutes and decisions thereon. Certainly no subsequent validation of such original improper registration would have the retroactive effect of charging with constructive notice one who had purchased before any such validation and no such attempt was made by any validating act. And we again repeat our challenge to petitioner's counsel to explain to this court how they can affect one with constructive notice by the improper and illegal registration of an instrument.

But, in the face of the record, petitioners' counsel contend that Veatch, Morgan and those subsequent in that chain of title have not claimed this land, and that thereby the presumption may be indulged that Veatch was not an innocent purchaser for value. We have al-

ready seen that this pretended non-claim is a figment of counsel's imagination. They seem to hope, however, that by persistence and repetition, they may induce this court to believe this statement notwithstanding it is shown to be wholly unsupported by the record. The trial court as well as the court of appeals hold that there was no such non-claim, and the record abundantly sustains this conclusion, and shows that the claim of Veatch and those in that chain of title has been active and diligent, and more especially about the time when the conduct of the parties would tend to throw light upon this subject. We have treated the subject fully in our motion.

V.

Respondent having shown by certificate from the office of the Secretary of State, the proper custodian of the records, that Wm. Myers, the person who purports to have taken the acknowledgment of the grantor to the deed from Felder to Daniel, was District Clerk, or at one time justice of the peace (R. 366). Counsel for petitioners then undertake by some very peculiar reasoning to show that he was a notary public, and, therefore, as such took the acknowledgment in question; apparently unmindful of the fact that if he had held that office he could not at that time have taken such acknowledgment. As to what officers were authorized to take acknowledgments of deeds in 1839, when the instrument in question purports to have been acknowledged has been shown in out motion on pp. 5 and 6, where the statutes governing that subject are set out. It will be noted that a Notary Public was for the first time authorized to take acknowledgments by act of February 5th, 1840. However, there is nothing in this record which shows or tends to show that William Myers was ever a notary Public or that he

was ever at any time one of the two associate justices of Jasper County. But if he were, his duties and powers as such were defined by the Act of 1837 quoted on page 9 of petitioners' reply to our motion, wherefrom it appears, that "in cases in which the chief justice of the county courts may be interested, and in case of the absence or inability of the chief justices to act, the associate justices of the county court" (not one of them but both of them) "shall be authorized to act as judges of probate; and either of the said associate justices may act as notary public in such cases and during such period". That is in such cases as the chief justice could act as notary public. But the powers of the chief justice as notary public were confined exclusively to matters pertaining to *commerce* and *navigation*, as provided by section 34 of the act of 1836, Paschal's Dig. Art. 4678; Hartley's Dig. Art. 2588, which reads as follows:

"The chief justice of the several county courts, shall be *ex officio* notaries public for their respective counties; they shall have power to administer oaths and affirmations in all matters relating to their notarial office; shall have power to receive to proof or acknowledgments of all instruments of writing relating to commerce or navigation, and also to make declarations, and testify to the truth thereof, under their seal of office, concerning all matters done by them in virtue of their offices, and when require, shall give a certified copy of any record of their offices, to any one applying for the same; and for all acts done by them, as notary, they shall receive such fees as may be provided by law; the seal of the county court shall be the notarial seal, and shall be fixed to all instruments and attestations of the respective notaries."

Section 35 of the same act, Paschal's Dig. Art. 4973, Hartley's Dig. Art. 2752 prescribes how deeds should

be proven for record at that time. This method, of course was changed by subsequent acts as we have seen.

And so we see the fine spun theory of petitioners' counsel making a notary public of William Myers, and empowered to take acknowledgments of deeds comes to nought. That William Myers was not a notary public and that he was not authorized to take acknowledgments to deeds must be conceded.

CONCLUSION.

There are many other statements made by petitioners counsel not sustained by the record to which we could again refer; but what we have said seems to be a sufficient rejoinder to their answer to our motion.

We submit this motion in the earnest hope that this litigation, already pending for about five years, may be speedily brought to a just and proper conclusion.

WILLIAM D. GORDON,
Attorney for Respondents.

Of Counsel

HARRISON M. WHITAKER,
EUGENE E. EASTERLING,
THOMAS J. BATEN.

No. 333

76

Office Supreme Court, U.

FILED

MAR 12 1917

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS
ET AL.,

VS.

Petitioners,

CORNELIA G. GOODRICH ET AL.,

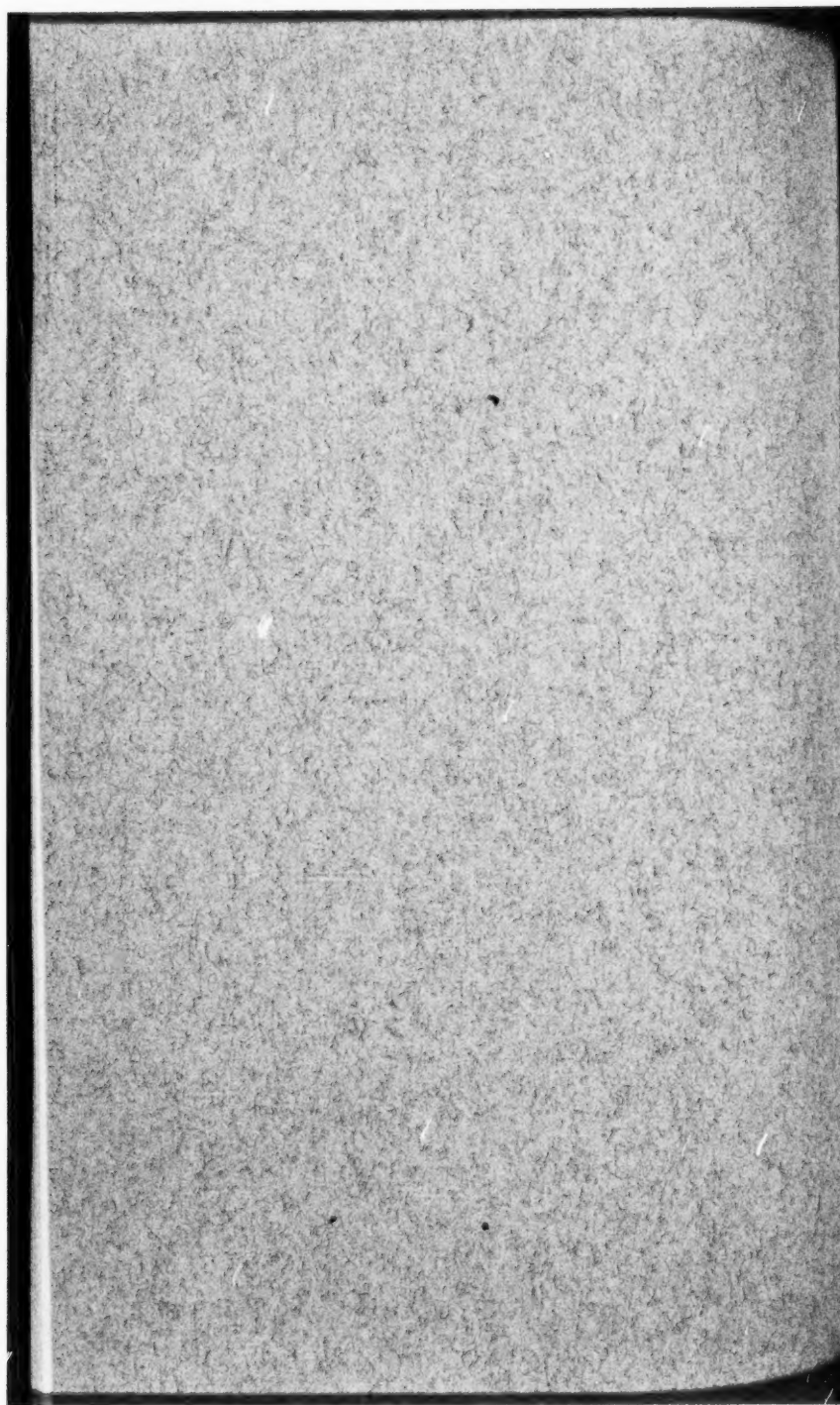
Respondents.

ANSWER TO THE MOTION OF THE PETITION-
ERS FOR A RULE TO SHOW CAUSE, ETC.

— By —

WILLIAM D. GORDON,
Attorney for Respondents.

HARRISON M. WHITAKER,
EUGENE E. EASTERLING,
THOS. J. BATEN,
Of Counsel.



INDEX

	PAGES
I. Preliminary Statement	1
First False Statement:	
(1) The charge of house burning.....	2- 5
The Second False Statement:	
(2) The charge of conspiracy by respondents to organize a corporation and avoid liability for appropriation of timber	5- 7
Respondents' Answer to These Charges:	
<i>First:</i> As to the charge of arson.....	8-10
<i>Second:</i> As to the charge of conspiracy to es- cape liability etc.	10-15
II. The Facts Apparent of Record.....	15-18
No writ of supersedeas was ever issued or served in this case by any court.....	19-21
Verification of this answer.....	21-24
III. Conclusion	25-26



IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS
ET AL.,

vs.

Petitioners,

CORNELIA G. GOODRICH ET AL.,

Respondents.

No. 335

ANSWER TO THE MOTION OF THE PETITION-
ERS FOR A RULE TO SHOW CAUSE, ETC.

*To the Honorable, the Supreme Court of the United
States:*

The respondents in the above entitled cause come now by counsel for the purpose of answering the motion presented against them for a rule to show cause why they should not be adjudged in contempt of this Honorable Court; and they thereupon say:

I.

Preliminary Statement.

The statements in this motion, in the brief and affidavits accompanying the same as to matters extraneous

of record, as filed in this Honorable Court, are utterly false in the following specific particulars:

First False Statement.

(1) The charge of "house" burning.

It is asserted on page 12 as follows:

"Burning House in Violation of Supersedeas.

"In addition to their record title and claim running back for seventy-five years, connecting by regular chain of conveyances with the sovereignty of the soil, petitioners replied in the trial court upon the three, five and ten years statutes of limitation. One of the most important, if not the most important, pieces of evidence in support of said limitation title, was house known as the W. T. Carroll house (shown in photograph No. 1 sent up with the record in this case), built upon said property about 1901. This house has been destroyed by respondents since the granting of said supersedeas, and, it is believed, since the granting by this court of writ of certiorari."
(Page 12.)

In the "Subject Index to Motion," it is asserted as to contents of motion to require respondents to show cause why they should not be held in contempt of the court:

"For burning house on premises in controversy, in violation of supersedeas, which house was valuable evidence in this cause." (Page 1.)

On the same page it is further averred as follows:

"Affidavits showing cutting and appropriating of timber in violation of supersedeas, etc., and burning of house." (Page 1.)

Under the heading of "Subject Index to Brief" is the following language:

"Presentation of proposition that the burning of

the house situated on land in suit, which house was valuable evidence for petitioners, since the granting and service of said supersedeas and granting of writ of certiorari, is contempt of this court." (Page 2.)

In the supporting affidavits appears the following:

"AFFIDAVIT OF THOS. M. KENNERLY.

"That affiant passed Fletcher Station on the train in June, 1915, and said house was then still standing; that affiant passed said station again in October, 1916, and said house was gone, from which facts affiant is able to testify that said house was destroyed, as shown by the affidavits of said W. A. McClelland, Eugene McMahon and H. A. Woods, after the granting and service of the supersedeas in this cause, and affiant believes and so charges that same was destroyed after the granting by this court of writ of certiorari herein."

There also appears the following from the

"AFFIDAVIT OF W. A. McCLELLAND.

"I do not know the *exact date that such house was destroyed*, but I passed Fletcher Switch, where the house stood, on an average of *once a week*, and *I did not miss the house until six or eight months previous to making this affidavit*. On February 9, 1917, I asked Pink Wiggins, who is the agent and *bookkeeper for the Village Mills Company, what had become of this house*. He replied that they (meaning the Village Mills Company, and its officers, agents and employes) had burned it up; *that the health officer had condemned it*." (Page 50.)

And from the joint

"AFFIDAVITS OF McCLELLAND, McMAHON AND WOODS.

"Said house has been completely and entirely destroyed, and there is now no sign upon the ground showing where it stood." (Page 54.)

From the "Statement of the Case," page 6:

"A house, known as the W. T. Carroll house, and shown by photograph No. 1, sent up with the record in this case, *which was perhaps the most, certainly one of the most, valuable pieces of evidence offered in the trial court to sustain petitioners' title, has been burned by respondents since the granting and service of said supersedeas, and in violation thereof,* and, it is believed and charged, since this court granted its writ of certiorari herein." (Page 6.)

It thus appears that this motion deliberately charges the respondents in this case with the crime of arson. (White's Ann. Penal Code of Texas, Arts. 756, 757.)

It also thus appears that this charge is based upon:

The affidavit of Thos. M. Kennerly, who says "that he is one of the general attorneys for the Houston Oil Company of Texas; and that affiant believes and so charges" that this crime was committed by the respondents in this case, including the lawyers representing the litigants, one of whom is a member of the bar of the Supreme Court of the United States.

It will be noted that Thos. M. Kennerly does not assert that he has learned from any source that such facts are true; nor does he aver such facts are true upon information furnished him. He avers this because he "*believes and so charges*" that this is true.

The only specific supporting proof averred in this document is contained in a statement of W. A. McClelland, one of the Houston Oil Company's employes, that "Pink Wiggins, who is the agent and bookkeeper of the Village Mills Company," in replying to a question addressed to him by McClelland on February 9, 1917, said "*that they* (meaning the Village Mills Company's officers, agents

and employes) *had burned it up; that the health officer had condemned it.*"

It will be noted in this statement that McClelland did not say that Wiggins told him that the Village Mills Company's officers, agents or employes had done any such thing, but "that they had burned it up; that the health officer had condemned it," and McClelland, in his affidavit, parenthetically inserts the statement as to who he thought Pink Wiggins meant.

Reduced to its final analysis, the motion asserts that the respondents in this suit have committed the crime of arson, and the basis of this deliberate charge is that Thos. M. Kennerly "believes" that it is true, and "so charges it."

The Second False Statement.

(2) The charge of conspiracy by respondents to organize a corporation and avoid liability for appropriation of timber.

It is deliberately charged in this motion, brief and affidavit as follows:

Affidavit of Thos. M. Kennerly, "one of the general attorneys of the Houston Oil Company of Texas":

"That affiant believes and so charges, that soon after the rendition of the judgment of December 2, 1912, and about the time of suing out by petitioners of their writ of error from said judgment of December 2, 1912, the said parties respondent and said attorneys respondent, some or all, conceived and formed the purpose, design, and scheme, and each with the others agreed and conspired to enter upon said tract of land, and into the improvements thereon, and take and remove such yellow pine timber and

appropriate same to their own use and benefit, under conditions aptly calculated to enable them to escape liability therefor." (Page 40.)

Also:

"That to aid in carrying out such design and scheme, parties respondent and attorneys respondent sought the assistance and aid of said J. Ben Hooks and said Wiley J. Bracken, and said Hooks and Bracken, with full knowledge and notice of the title and claim of petitioners to said land, and of the pendency of this suit, and of all the papers, pleadings and proceedings in this cause at that time had, entered into said design and scheme as aforesaid with parties respondent and attorneys respondent, and each agreed and conspired with the others to carry out said design, scheme and conspiracy." (Pages 40-41.)

"That affiant believes and so charges, that upon the organization of said corporation, the said parties respondent and attorneys respondent and said Hooks and said Bracken and said Village Mills Company, acting together and each acting for the others, and in furtherance of and carrying out said design, scheme, and conspiracy, and acting by themselves and through said Village Mills Company, on or about October 11, 1913 (having theretofore been placed in possession of said tract or parcel of land under and by virtue of the writ of possession issued on said judgment of December 2, 1912, as aforesaid, which judgment was reversed as aforesaid), began cutting and removing and appropriating to their own use and benefit the said timber thereon, and have continuously from time to time since so been cutting, removing and appropriating said timber." (Page 42.)

It is then asserted that these things were done by the respondents "with the purpose of interfering with and defeating the jurisdiction of said District Court and the

Circuit Court of Appeals and of this court over said property."

The following language is found on page 18 of said document:

"Proposition No. Five.

"Not only those respondents who are parties to this suit, but likewise their attorneys, Messrs. William D. Gordon, Thos. J. Baten, Harrison M. Whitaker, and Eugene E. Easterling, are in contempt of this court." (Page 18.)

And under this proposition is this language:

"Petitioners claim that the stock of Village Mills Company is owned by the parties to this suit and their attorneys and said Hooks and said Bracken, and that the Village Mills Company was organized and used in order to escape liability."

It is apparent, therefore, that this charge of most serious nature by a member of the bar of this court against his adversaries in this litigation and their attorneys, one of whom is also a member of this bar, is predicated upon no asserted information to that effect, is not supported by any affidavit to that effect, but is made because Thos. M. Kennerly "believes and so charges" the truth of these statements.

Such from the face of this motion filed in this court in the form of a printed document covering 63 pages are the charges lodged against the respondents, and such basis in fact of the charges, namely, that "affiant believes" these things to be true and "so charges" their truth. And with his name to said document, is that of W. L. Marbury and the names of other lawyers signed as "of counsel."

Respondents' Answer to These Charges.**First: As to the charge of arson.**

We here assert to this Honorable Court, under our solemn oaths, that this charge is utterly and entirely false; that it has no single element or basis in truth and in fact; that neither W. D. Gordon, Harrison M. Whitaker, Thos. J. Baten nor E. E. Easterling, the attorneys for the defendants in error in this cause, ever knew or heard of the alleged destruction of the said "house" until they received a copy of this printed document. They further allege that they are the sole attorneys for the defendants in error in this cause. That their clients are non-residents of the State of Texas, and affiants verily believe have never heard of the alleged destruction of said "house" until this document was delivered to them, and that every statement made concerning it in said document as to them is utterly false.

And the affiants J. B. Hooks and Wiley J. Bracken, denominated respondents in this motion, one or both, have been daily upon said property during the entire time covered by these allegations, and are able to state positively and unequivocally that said charges are utterly false as to them. Affiant Wiggins, referred to in McClelland's affidavit, declaring upon his oath that he never at any time, or anywhere, made the statement to McClelland, or anyone else, either directly or indirectly, that the Village Mills Company, its officers, agents or employes burned or destroyed said "house" as alleged; that such is not true in any respect. The truth concerning that matter is based upon the affidavit of Mr. Wiggins appended to this answer, and the affidavit of A. G. Heard, the substance of which is that what is known as the W. T.

Carroll "house" on the right-of-way of the railroad company was rotting down, the walls and roof caving in, and was occupied by hogs running at large, and was condemned by the health officer. Whereupon, Mr. Heard demolished it, taking such boards therefrom as were sound, and using them to build a garden fence. The remainder of the rubbish being thereupon burned, with none of which were the Village Mills Company, or Hooks and Bracken, or any of the counsel of the defendants in error, or any other person named in this motion, in the slightest degree concerned.

It further appears from the printed record in this cause that W. T. Carroll was a pumper for the G. B. K. C. R'y Co. in 1901 and 1902; that his wife built this "house" on the right-of-way of the railroad company. (R., 734.)

Carroll himself swore that when he left there as pumper for the railroad company he sold the "house." His language is as follows:

"I just moved off and left it there."

"Q. Did you sell it to anybody? A. Not at that time."

"Q. Did you afterwards? A. Yes, sir, to a negro."

"Q. For how much? A. Ten dollars." (R., 688.)

He was then asked this question:

"Q. Did you have anything to do with the Texas Pine Land Association, or the Houston Oil Company, about you staying there? A. No, sir.

"Q. Not a thing? A. No, sir." (R., 694.)

"Q. By what authority were you there? A. I was employed by the G. B. K. C. R'y." (R., 688.)

“Q. He (the R’y Co. Superintendent) gave you permission to build the ‘house’? A. Yes, sir.” (R., 689.)

This evidence was developed, as the Record shows, by and in the presence of the same Thos. M. Kennerly presenting this motion. (R., 688.)

Second: As to the charge of conspiracy to escape liability, etc.

The statement made in this document by Thos. M. Kennerly and his associates above quoted to the effect that W. D. Gordon, Thos. J. Baten, Harrison M. Whitaker and E. E. Easterling, attorneys of record for the defendants in error in this case, entered into a conspiracy in this case with Hooks and Bracken to organize a corporation and cut and appropriate the timber on this land, and thereby escape liability against the claim of the plaintiffs in error, is utterly false. It has not one single shred of basis in fact for such a charge. The charge also made to the effect that, “the stock of the Village Mills Company is owned by the parties to this suit and their attorneys, and the said Hooks and Bracken, that the Village Mills Company organized and used in order to escape liability” is utterly false. The truth is, that none of the defendants in error in this suit, nor their attorneys, ever, at any time, directly or indirectly, had any interest of any nature or kind in the stock of the Village Mills Company or in its activities, other than as follows, to wit:

After the judgment was rendered in this cause in 1912, adjudging to the Goodrich and Morgan claimants (defendants in error), the land in controversy, and after a writ of execution, restitution and possession had issued upon said judgment, and had been executed by the United

States Marshal for the Eastern District of Texas, and a collection made of the damages which had been awarded against the Houston Oil Company et al. (plaintiffs in error), and the possession of the land fully delivered under process of the Federal Court to plaintiffs in said suit, and their title fully and completely established in said land against the claim of their adversaries, J. B. Hooks and W. J. Bracken, entire strangers to the litigant parties, practical and experienced sawmill men, then purchased the timber on said land from defendants in error at the price of three and 50/100 (\$3.50) dollars per thousand, its full market value at the time, with right to use so much of the surface of said land as was necessary for the building and operating of sawmill and planing plant for the manufacturing of said timber into merchantable lumber. They thereupon, as appears from the charter in this proceeding, organized the Village Mills Company under the corporate laws of Texas, with J. B. Hooks owning ten thousand (\$10,000.00) dollars of the stock, W. J. Bracken five thousand (\$5000.00) dollars, Thos. J. Baten five thousand (\$5000.00) dollars, of which last amount a portion was subsequently acquired by W. D. Gordon. They then erected thereon a sawmill and planing plant, dry kilns, yards, etc., on the west side of the railroad track at Fletcher, at an expense far in excess of the capital stock of the company, and since that time they have cut and manufactured the merchantable timber from said land, being protected in their possession and title thereto by the United States District Court having primary jurisdiction of the cause, and by the United States Circuit Court of Appeals, against attempts by the plaintiffs in error to obtain possession thereof through a motion filed in the trial court, which was denied (R., 46-48), and

through another motion filed in the United States Circuit Court of Appeals, and which was denied by the complete affirmance of the judgment of the lower court. (R., 972-990.)

Meantime, when the Circuit Court of Appeals at New Orleans affirmed the judgment of the court below, the Record shows plaintiffs in error presented a motion for a re-hearing, specifying thirteen grounds of error committed by that court, *but no complaint whatsoever was made at the refusal to take the possession from the defendants in error and deliver it to the plaintiffs in error.* (R., 991-999.)

And when this cause was presented in this Honorable Court in a petition for the writ of certiorari, *no complaint was made in this regard.*

In the meantime, Articles 240 and 7094 of Vernon's Sayles' Revised Statutes of the State of Texas gave a legal remedy to the plaintiffs in error to take said possession from the defendants in error by suing out a writ of attachment or sequestration by giving a bond commensurate with the value of the property sequestered. (Art. 7097.) They did not attempt to do this.

Not only so, but courts of equity were open to them upon a showing and entitling them to relief against the defendants in error, by injunction and receivership, in both of which instances bonds are required to secure the party complained against in his damages for the taking from his hands property awarded to him by the courts of the country. They pursued neither course.

Not only so, but as will appear by a certified copy filed herewith and marked Exhibit "A," the plaintiffs in error went into the District Court, at Houston, Texas, in violation of the venue statute of this State, brought a

trespass to try title suit against these respondents for this same land, and asking for the manufactured price of the timber thereon in the sum of one hundred and eighty thousand (\$180,000.00) dollars, which said suit is now pending, having been continued from term to term to await the final decision of this case.

And not until, as affirmatively appears from this motion, the Village Mills Company, under its purchase aforesaid, had entirely cut and removed all the merchantable pine timber from said land, and not until thirteen months after this cause had been pending in this court, has any complaint been made other than hereinbefore detailed as to the cutting and manufacturing of said timber and its appropriation by those to whom it has been sold, and under title confirmed by two trials and two appeals.

The Record affirmatively shows in this case *that the basis of the Houston Oil Company's title, aside from the plea of limitations, to this league of land, is a quit-claim deed from Bill Daniels for a consideration of thirty-three and 33/100 (\$33.33) dollars, or seven-tenths of one cent per acre, with the Record further affirmatively showing that Bill Daniels was fraudulently impersonating William A. Daniel, who had been dead five (5) years before this deed was made.* (See "Respondents' Motion to Affirm," pages 15 to 19, where the facts are collated from the Record.)

This may explain why the legal remedies requiring adequate bond were not resorted to by the petitioners to take the possession of the land from defendants in error. It may also explain why both in the specifications of error in the petition to this Honorable Court, and in this motion (p. 12) *it is falsely stated that they deraigned title by a regular chain of transfer from and under the sov-*

ereignty of the soil, "running back for seventy-five years."

Respondents Hooks and Bracken further say that the corporation of which they own and control seventy-five per cent. of the stock, to wit, the Village Mills Company, while having a nominal paid-up capital of only twenty thousand (\$20,000.00) dollars, is the fee simple owner of land and timber in Hardin County, Texas, as shown by the Deed Records at Kountze, in excess of 5500 acres, aside from the land in controversy in this suit, and aside from the adjacent D. C. Montgomery survey of 4428 acres, for which latter named tract they are being sued by the Houston Oil Company and its co-plaintiffs, but the title to which latter named tract has been upheld by the Court of Civil Appeals for the Ninth Supreme Judicial District of Texas, in the case of the Houston Oil Company v. Village Mills Company et al., 186 S. W., page 785. Thus, including the land in litigation and that clear of litigation, the Village Mills Company is the fee simple owner, as aforesaid, of more than ten thousand acres of land, besides the sawmill plant, stock of lumber, tramroad and money on hand, of which latter it has at this time more than twenty thousand (\$20,000.00) dollars.

These facts, if not actually known to the plaintiffs in error or their counsel, were in a large measure chargeable to them, from the public records of Hardin County, Texas, where the land in controversy lies, and where its properties are situated. Furthermore, all of the earnings have gone into the expansion of the company's business in the acquisition of additional land and timber, and not a single dollar has been paid out to its stockholders as dividends since the company was organized.

Therefore, the charge made in this motion that "the

Village Mills Company was organized and used in order to escape liability" (page 18) is grossly false. And they further say that this company is fully able to respond in damages for an amount far beyond that claimed in the motion filed in this case for any timber cut by said company.

II.

The Facts Apparent of Record.

This motion is predicated upon an assertion that respondents are guilty of contempt of this Honorable Court "in violation of supersedeas" (Index, page 1); "*since the granting and service of said supersedeas.*" (Index, page 2.)

After the formal part of the motion complaining against respondents this language is used: "To show cause why they and each of them should not be judged in contempt of this court, and punished therefor, *for violating the order of supersedeas herein.*" (Motion, page 2.)

The Record shows the following:

On the 7th of December, 1912, the defendants in error procured a judgment against the plaintiffs in error for the land in controversy, and on the 25th of February, 1913, a writ of possession was issued pursuant to said judgment. (R., 34-35.)

On the 3rd day of March, 1913, this writ was returned executed in the following language:

"Received this writ on Feb. 27th, 1913, and executed on same date by dispossessing the *Texas Builders Supply Company, through service on Theodore E. Danziger, Secretary and Treasurer, of this tract of land in this writ described, they being the only de-*

fendants found in active (actual) possession of the land, and I, by virtue of this writ, put in possession of said described tract of land the plaintiffs and intervenors mentioned in this writ, through their attorneys.

“Returned on this 3rd day of March, 1913.

“PHIL E. BAER, *U. S. Marshal,*

“By C. L. RUTT, *Deputy U. S. Marshal.*”

(R., 35-36.)

The Record shows that the *only land in controversy* which the Houston Oil Company or its co-claimants ever had *any possession of* was through said Texas Builders Supply Company, *consisting of a sand pit on the west side of the railroad track at Fletcher, expressly restricted to a few acres.* (R., 225-227, 250, 697, 710, 724-725, 732, 737, 749.)

The Record shows that this issue was submitted to the jury by the trial court, and the jury found against the plaintiffs in error, and no complaint was made by exception to the issue so submitted. (R., 799-804.)

It therefore affirmatively appears that no actual possession was ever had by the petitioners of this land whereon grew the trees complained of in this motion.

The Record affirmatively shows that the only possession ever had by the petitioners was through the Texas Builders Supply Company, which was taken by the marshal from that company and delivered to the true owners, the defendants in error, by the writ above referred to and the return above quoted, that they were “the only defendants found in actual possession of the land.”

Therefore, the statement under oath of Thos. M. Kennerly that “The Houston Oil Company of Texas was in actual possession of said tract of land by and through its agents, contractors and tenants, the Texas Builders

Supply * * * and it and those under whom it claimed had been so claiming and in possession of same for many years prior to the institution of this suit" (p. 36), is shown by the record to be untrue as applied to anything except a sand bank on said survey. See also facts recited in "Respondents' Motion to Affirm." (Pages 56 to 58.)

The Record further shows that on November 17, 1914 (R., 46-48)—three days before the case was tried (R., 806)—an effort was made by a "motion for restitution" in the trial court to obtain possession of the land in controversy from the defendants in error, in the 5th paragraph of which this language appears:

"That if this case is permitted to go to trial without this court having required restitution, as prayed for in original motion, *and plaintiffs and intervenors do not recover herein, said plaintiffs and intervenors will then be in position to file a supersedeas bond and retain possession of the property involved in the suit, pending an appeal, and will be in position to, and will continue to cut and remove timber from said tract of land, and may remove same from the jurisdiction of the court. That if upon the trial of this cause plaintiffs and intervenors recover judgment, your petitioners cannot, by the filing of a supersedeas bond, again repossess said property, as they were previous to the entry of judgment herein, as alleged in the original motion.*" (R., 48.)

This motion was in all things denied. (R., 810.)

Thus the defendants in error (respondents herein) were left in actual possession of said land delivered to them under process of the court, as shown by the return of the marshal who executed the writ of possession and restitution. The costs of this protracted litigation were

adjudged against the plaintiffs in error by said judgment. (R., 806-810.)

A motion for a new trial was then presented (R., 811-857), which was in all things overruled. (R., 857.)

Assignment of errors containing 86 grounds was filed February 1, 1915. (R., 864 to 959.)

The writ of error was allowed February 3, 1915, upon the filing of a bond in the sum of five thousand (\$5000.00) dollars. (R., 960-967.)

This bond, after reciting the names of the parties, the judgment on the merits, and the judgment on the motion for restitution, concludes with the following language:

"Now, the condition of the above obligation is such that if the said Houston Oil Company of Texas and Kirby Lumber Company and Maryland Trust Company shall prosecute their writ of error to effect and answer all damages and costs, if they fail to make good their plea, then the above obligation to be void, else to remain in full force and virtue." (R., 967.)

But the bond, as will thus appear, simply superseded execution for costs, for the possession had already been delivered to the winning litigants under previous writ of possession, as well as the execution of the moneyed judgment for sand which had been removed by the Texas Builders Supply Company. Hence the "*supersedeas bond*" provided that the Houston Oil Company and its co-claimants would "*answer all damages and costs if they fail to make good their plea.*" (R., 967.) (See *Hovey v. McDonald*, 109 U. S., 150-160; 27 L. Ed., p. 891, left column.)

No writ of supersedeas was ever issued or served in this case by any court.

Therefore, the assertion that the respondents committed "house burning," entered into a "conspiracy to appropriate timber in violation of supersedeas," and since "the granting and service of said supersedeas," has no basis—the facts being as above quoted from the Record.

On March 10, 1915, a motion was filed in the United States Circuit Court of Appeals in this case by the plaintiffs in error seeking to acquire from that court an order to take from the defendants in error the possession of said land and deliver it to them. (R., 972 *et seq.*)

In the 15th paragraph of this motion it is expressly averred as follows:

"That since plaintiffs, in the court below, and intervenors in the court below, were placed in possession of said tract of land by the said marshal, as aforesaid, they have remained in actual possession thereof, and are now in actual possession thereof." (R., 976.)

And in paragraph 18 of said motion this language is used:

"That there is still standing upon said tract of land a large quantity of both pine and hardwood timber, and plaintiffs, in the court below, and intervenors, in the court below, are claiming and insisting that they are entitled to cut, remove and take away said pine and hardwood timber, and are threatening to cut, take and remove same, and plaintiffs are informed and believe that if said persons are permitted to remain in possession of said tract of land they will so cut and remove same, to your petitioners' great damage, so that at the end of this litigation the

subject-matter thereof will not be present upon which the process of the court and the decree of the court may act, but will have been dissipated, destroyed and carried away by such persons." (R., 977.)

This motion was answered in the appellate court on the 8th of April, 1915. (R., 982-987.)

On October 4, 1915, the action of the lower court in all things was affirmed in the Circuit Court of Appeals. (R., 988-991.)

On October 22, 1915, a petition for re-hearing was presented to the Circuit Court of Appeals, which contained thirteen specifications of error as "grounds for re-hearing." (R., 991 to 999.) It was denied on the 19th of November, 1915. (R., 999.)

In said motion for re-hearing no complaint was made at the action of the court in refusing the prayer for restitution, either in the court below or in the Circuit Court of Appeals.

On the 3rd of January, 1916, a petition for writ of certiorari was filed in this Honorable Court containing five specifications of error, but there was no complaint at the refusal of the lower courts to take the possession of the land from the respondents and deliver it to the petitioners. These specifications of error were not replied to until the writ was granted, when respondents then filed a motion in this Honorable Court to summarily advance the case and affirm it upon the ground that the writ had been obtained upon specifications of error printed in black-face type, asserting facts as the basis for the granting of the writ, which were absolutely untrue, as affirmatively shown by the Record. See "Respondents' Motion to Affirm," wherein these charges are made. (Pages 1-62.) In the statements quoted from the record it is affirm-

atively shown that the facts upon which the jurisdiction of this Honorable Court was invoked to grant the writ were untrue.

A reply was made to said motion which did not deny the charges made therein, that the facts had been falsely presented to the Supreme Court in the specifications of error, the chief one being the first in the petition. (Page 30.)

The court overruled the motion to summarily advance the case and affirm it, and left it pending in its regular order on the docket for hearing.

Verification of This Answer.

We, William D. Gordon, Harrison M. Whitaker, and Eugene E. Easterling, on our solemn oaths, declare that the facts set forth in the foregoing answer are in substance and form as therein stated true.

WILLIAM D. GORDON,
HARRISON M. WHITAKER,
EUGENE E. EASTERLING.

SUBSCRIBED AND SWORN to before me this 2nd day of March, A. D. 1917.

L. M. LACK,
*Notary Public in and For Jefferson
County, Texas.*

(Seal)

We, J. B. Hooks and W. J. Bracken, on our solemn oaths, declare that the facts set out in the foregoing motion concerning ourselves and the Village Mills Company, and matters of facts relating to ourselves or said com-

pany concerning the subject-matter, our relation thereto, and to the respective parties to this proceeding, are in substance and form as stated in said motion true.

J. B. HOOKS,

W. J. BRACKEN.

SUBSCRIBED AND SWORN to before me this 2nd day of March, A. D. 1917.

L. M. LACK,

*Notary Public in and for Jefferson
County, Texas.*

(Seal)

STATE OF TEXAS,
COUNTY OF JEFFERSON.

BEFORE ME, the undersigned authority, on this day personally appeared P. S. Wiggins, who, on oath, deposes and says:

My name is P. S. Wiggins. I am 30 years of age. I am the same person denominated in the affidavit of W. A. McClelland as Pink Wiggins, and have examined his statement made on page 50 of the printed motion of the Houston Oil Company. When my attention was called to this statement, I immediately went to see Mr. McClelland, and stated to him that I never made any such statement, and demanded to know the occasion for the statement attributed to me. He said that on the date mentioned, Feb. 9, 1917, while waiting for the train on which he was to leave, he met affiant, and asked him what had become of said "house." He claimed that I replied to his question, which he said he had made to me in a joking way, substantially as he had stated in his affidavit. I replied that I had no recollection of his ever mentioning that matter to me at all.

I now state the facts as follows: I am a bookkeeper for the Village Mills Company. I hold no official position with said company, and I am not its agent. I have read the affidavit of Mr. Heard to the effect that about one (1) year ago he demolished the remnant of the shack mentioned by him, and burnt up the trash which was left. That is all I know about it. I have never stated that "the officers, agents or employes of the Village Mills Company did it," and I certainly never told Mr. McClelland any such thing.

The facts about the "house" are clearly stated in Mr. Heard's affidavit, and I am not responsible for Mr. McClelland's inference, or what he thought was meant from anything I said, but the facts are as stated.

WITNESS my hand this 2nd day of March, A. D. 1917.

P. S. WIGGINS.

SUBSCRIBED AND SWORN to before me this 2nd day of March, A. D. 1917.

JNO. D. McCALL,
*Notary Public in and for Jefferson
County, Texas.*

(Seal)

STATE OF TEXAS,
COUNTY OF JEFFERSON.

BEFORE ME, the undersigned authority, on this day personally appeared A. G. Heard, who, on his oath, deposes and says:

My name is A. G. Heard. I am 44 years of age, and live in Hardin County, and have lived there for twelve years. I am married, and the head of a family.

I knew of what was called the "Carroll house," on the right-of-way of the railroad, at Fletcher. It was a

mere shack, about sixteen feet square, with shed room hooked on the side. It has never been occupied since I have known it. It was an abandoned shack. The shed room had fallen down, and the roof was rotten, as well as a good portion of the walls of the building. In fact, it was almost entirely decayed and ready to collapse. It was absolutely uninhabitable. The hogs of the community were sleeping in it. It was of no value at all for any purpose known to me.

About one year ago I asked Mr. Bracken at Fletcher if he had any objections to me knocking it down and taking any boards that could be used in fencing. He replied that he had nothing to do with it, and so far as he was concerned he had no objections. I then tore it down and took such boards as were not rotten to build a fence around a watermelon patch which I was cultivating on a small piece of ground. I got very little fencing material out of it. The remaining portion of the rotten material was burned up as trash.

I make this affidavit for the purpose of showing what was actually done.

WITNESS my hand at Beaumont, Texas, this March 1, A. D. 1917.

A. G. HEARD.

SUBSCRIBED AND SWORN to before me this March 1, A. D. 1917.

L. C. SINGLETON,
*Notary Public in and for Jefferson
County, Texas.*

(Seal)

III.

Conclusion.*May it please the Court:*

We have shown in this answer that an attorney of this bar, who is an officer of this court by reason of his membership here, has in a most unwarranted manner filed in this court a scandalous libel against a brother member of this court, occupying the same status with himself, and against three other Texas lawyers of unimpeachable character and standing, who are members of the bar of the inferior and superior courts of Texas, and of the United States District Courts and Circuit Court of Appeals. In addition to this, the document, by wholesale false charges, impeaches the honor and character of the descendants of James Morgan, once the Secretary of the Navy of the Republic of Texas, and a man of exalted patriotism and unimpeachable integrity, as shown affirmatively by the Record of this cause; also in like manner has assailed the honor and integrity of Cornelia G. Goodrich and her co-claimants, and also other citizens of Texas, who are strangers to this cause. This has been done under the guise of serving the interests of the plaintiffs in error in this cause. Of the chief of which this attorney asserts in his affidavit that he is "one of the general attorneys."

It is indeed painful and humiliating in the extreme, even as matters of defense to unfounded charges, that we are compelled to show the utter recklessness with which this motion has been filed by counsel for the petitioners, in an effort to destroy the good name of his adversaries at the bar.

Aside from all ethical considerations, aside from the bounden duty of an attorney to deal candidly and truth-

fully in his statements to this court, which permits him to practice before it, it is submitted that no man in this Republic has a lawful right under the guise of privilege of judicial proceeding to scandalize another, as has been done here.

May it please your Honors: What should be said of a case in court—in the greatest court established on earth—which cannot be presented by counsel upon its true facts?

What should be said of the privilege granted to a member of this bar and his clients for whom he appears, when it is used as a cloak and veil to scandalize the adversary parties with the most violent false charges? And to what extent can the indulgence of this court be exercised under such a situation?

We venture to suggest to your Honors that the doing of such things through the unimpassioned medium of cold type by an officer of this court is in itself contempt of this court. It would be difficult to imagine a more serious contempt.

We venture to suggest that this Honorable Court should deny this motion and strike this scandalous document from the files, as impertinent to any issue pending before this Honorable Court.

We therefore respectfully submit that this motion is impertinent as a legal proposition, untrue in its matters of fact, and pray that it be denied and stricken from the files.

Respectfully submitted,

WILLIAM D. GORDON,
Attorney for Respondents.

HARRISON M. WHITAKER,
EUGENE E. EASTERLING,
THOS. J. BATEN,
Of Counsel.

No. [REDACTED]

Office Supreme Court, U. S.

FILED

73 OCT 30 1916

JAMES O. MAHER

CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS

ET AL.,

Plaintiffs in Error,

VS.

CORNELIA G. GOODRICH ET AL.,

Defendants in Error.

BRIEF FOR RESPONDENTS, DEFENDANTS
IN ERROR

— By —

WILLIAM D. GORDON,

Attorney for Defendants in Error.

HARRISON M. WHITAKER,

EUGENE E. EASTERLING,

THOMAS J. BATES,

Of Counsel.

SUBJECT INDEX

	PAGES
Preliminary Statement	1- 7
State of the Record on the First Trial.....	2- 4
State of the Record on the Second Trial.....	4- 7

I.

First Point	8-26
Relating to:	
(1) There is no evidence that Felder ever deeded this land to Daniel	17-22
(2) The petitioners are not connected with purported deed to Daniel	22-26
(a) William Myers shown not to have been a <i>de</i> <i>jure</i> notary public	9-11
(b) William Myers shown not to have been a <i>de</i> <i>facto</i> notary public	11-12
(c) Its invalid registration not constructive notice to Veatch	12-17

II.

SECOND POINT.

Relating to claim of petitioners under T. J. Word, begin- ning in 1855	27-29
---	-------

III.

THIRD POINT.

Relating to the assertion of claim of Respondents and those under whom they claim under the deed from Felder to Veatch in 1839	30-39
--	-------

IV.

FOURTH POINT.

Relating to the evidence which established the forgery of purported deed from Felder to William Daniel.....	39-46
--	-------

V.

FIFTH POINT.

Relating to the assertion of Petitioners that the evidence required submission to the jury of the forgery of the deed from Felder to Veatch46-69

VI.

SIXTH POINT.

There is no evidence tending to prove that Veatch was not an innocent purchaser for value70-71

VII.

SEVENTH POINT.

Relating to the question as to whether the purported deed from Felder to Daniel was recorded in Liberty County before it was filed and recorded in Menard County, so as to give constructive notice to Veatch.....71-76

VIII.

EIGHTH POINT.

Relating to the contention that the evidence raised an issue for the jury of 10 years limitation76-93

IX.

NINTH POINT.

Relating to the issue of 5 years limitation, which was submitted to the jury and decided against petitioners.....93-95

X.

TENTH POINT.

Relating to the assertion of Petitioners that an issue of 3 years limitation was raised by the evidence.....96-97
Conclusion97-98

LIST OF AUTHORITIES CITED

	CITED ON PAGE
Act of January, 1839 (Paschal's Digest of the Laws of Texas, Art. 4974, or Hartley's Dig., Art. 2760.....	5, 14, 75
Act of February 5, 1840 (see Paschal's Dig. Laws of Tex., Art. 4975, or Hartley's Dig., Arts. 2768, 2593) 5, 10, 75	5, 10, 75
Allen v. Clearman, 128 S. W., 1140.....	91
Am. & Eng. Ency. Law, Vol. 21, pp. 346 and 560.....	11, 48
Belcher v. Fox, 60 Texas, 529-530.....	19
Borland v. Walwrath, 33 Ia., p. 130.....	54
Brumby v. Boyd, 66 S. W., 874.....	11
Bracken v. Jones, 63 Tex., 184.....	86
Dunn v. Taylor, 102 Tex., 85.....	92
Downs v. Powell, 116 S. W., 873.....	86
Elliott v. Pearl, 10 Pet., 412.....	87
Duff v. Coal Co., 124 S. W., 309.....	47, 57
I Devlin on Real Estate, §§531-533.....	47
Encl. of Ev., Vol. 1, p. 876, note 86.....	42
Ellen Lee Mason v. Houston Oil Company, 173 Fed. R., 1021, 97 C. C. A., 668.....	
Frederick v. Warren, 76 Tex., 647.....	81
Goodrich v. Houston Oil Company, 234 U. S., 761.....	3
Grigsby v. May, 84 Tex., 252-254.....	97
Hanly v. Gandy, 28 Tex., 216.....	53
Heintz v. Thayer, 92 Texas, 663 to 666.....	17
Houston Oil Company v. Goodrich, 129 C. C. A., 488.....	4, 41, 65
Houston Oil Company v. Goodrich (second decision).....	13, 66
Houston Oil Company v. Kimball, 103 Tex., 94.....	4, 7, 21
Houston Oil Company v. Kimball, 107 Fed., 1021.....	35
Holland v. Nance, 102 Tex., 177.....	47
Houston Oil Co. v. Griffin, 166 S. W., 904.....	83

Hill v. Taylor, 77 Tex., 295.....	5, 73
Joske v. Irvine, 91 Tex., 582.....	46
Littleton v. Giddings, 47 Tex., 116.....	42
McElroy v. Bartine, 123 S. W., 1174.....	85
Mason v. Houston Oil Co., 173 Fed. Rep., 1021, 97 C. C. A., 668.....	
McAdams v. Weaver, 122 S. W., 619.....	86
McAllen v. Raphael, 96 S. W., 760.....	47, 60
McCarty v. Johnson, 49 S. W. (Tex.), 1098, 1101.....	16
Mynatt v. Hudson, 66 Tex., 66.....	63
McCelvey v. Cryer, 28 S. W. (Tex.), 691.....	5, 15, 16
Miller v. Bronson, 50 Tex., 583.....	29
Overland v. Menezzer, 83 Tex., 122.....	92
Newton v. Emerson, 66 Tex., 145.....	47, 55
Parker v. Waycross R. R. Co., 81 Georgia, 387; 8. S. E., 871 (cited in 13 Cyc., 728).....	43
Richards v. Smith, 67 Tex., 612.....	89
Riverra v. Wilkens, 72 S. W. (Tex.), 608.....	5, 73
Revised Texas Civil Statutes Art. 6484.....	84
Schultz v. Tonty Lumber Company, 82 S. W., 352.....	17
Stookesbury v. Swann, 85 Tex., 566.....	51
Tucker v. Smith, 68 Tex., 473.....	86
Titel v. Garland, 99 Tex., 201.....	86
Waltee v. Weaver, 57 Tex., 571.....	56
Weir Lumber Co. v. Conn, 156 S. W., 276.....	88
West v. Houston Oil Co., 129 S. W., 233.....	50, 52
Wiley v. Bargman, 90 S. W., 1116.....	89
Willis v. Lewis, 28 Tex., 190.....	47, 56
I Wharton's Ev., Sec. 705.....	48
I Wharton's Ev., Sec. 1052.....	48

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS
ET AL.,
vs. *Plaintiffs in Error,*

CORNELIA G. GOODRICH ET AL.,
Defendants in Error.

} No. 335

BRIEF FOR RESPONDENTS, DEFENDANTS
IN ERROR

Preliminary Statement.

On June 7th, 1911, Goodrich et al, as plaintiffs, brought a trespass to try title suit in the Federal Court at Beaumont, Texas, against the plaintiffs in error, for the recovery of the land in controversy; and on April 1st, 1912, the respondents Fannie M. Allan et al., as interveners, came into the case claiming under the same chain of title, to wit, from Charles A. Felder to John A. Veatch, which was the origin of the plaintiffs' title.

The State of the Record on the First Trial.

The case was tried in November, 1912. There were two questions involved:

First, whether the record title to the land was in the present respondents; and

Second, whether the plaintiffs in error had made a defense thereto under their pleas of adverse possession under the limitation laws of Texas.

The case resulted in a verdict being peremptorily directed by Judge Gordon Russell for the defendants in error, against the plaintiffs in error. The judgment became final, and was executed by the collection of the damages awarded, and a writ of possession issued, and the property formally delivered to the winning litigants.

A writ of error, however, was sued out to the Circuit Court of Appeals, and that court in all respects sustained the judgment of the lower court on the issue of title to the land, but by a divided court (Judge Shelby dissenting) remanded the case to the District Court with instructions to submit to the jury for their determination the issue of five years statute of limitations, which it was claimed the evidence raised.

The opinion of the Circuit Court of Appeals is found in 213 Federal, page 136.

There was no complaint by the plaintiffs in error at the action of the Circuit Court of Appeals in deciding that on the issue of title the defendants in error were right, and entitled to recover the property unless defeated by the defense of five years limitation, which issue alone was ordered submitted to the jury. That record came to the United States Supreme Court on a petition for writ of certiorari, sued out by the defendants in error,

because of the action of the Circuit Court of Appeals in holding that the facts authorized and required the submission to the jury of the plea of five years adverse possession under the limitation statutes.

This Honorable Court, however, declined to grant the writ of certiorari. (234 U. S., 759-761.)

The case was therefore remanded and tried again.

An inspection of the opinion of the Circuit Court of Appeals discloses the fact that the question of title as dependent upon the deeds adduced in evidence proceeded upon the theory that the plaintiffs in error held a genuine deed from Charles A. Felder to William A. Daniel, dated June 10, 1839. The record in that case shows that a certified copy of that deed was admitted in evidence upon the assumption that the deed was a genuine instrument, and that the plaintiffs in error deraigned title regularly under it. Furthermore, it appeared that the defendants in error deraigned their title under a deed from Charles A. Felder to John A. Veatch, dated June 18th, 1839, which instrument had been attacked by the plaintiffs in error as a forgery, but which attack failed to be sustained for the want of proof that the instrument was not genuine. Consequently, in the court below it was held to be a genuine deed, and that holding was affirmed in the Circuit Court of Appeals by unanimous opinion, the court then being composed of Pardee, Shelby and Grubb.

It was made clear that the true title to the land was thereby shown in the defendants in error, *because of the settled rule of decisions in Texas that since the deed from Felder to Daniel was not of record at the time of the conveyance from Felder to Veatch, the senior deed was void and of non-effect under the registration law of 1836*

then in force. (Houston Oil Company v. Kimball, 100 Texas, 336; Houston Oil Company v. Goodrich, 213 Federal, 136.)

This is conceded to be the law in the following language on page 90 of the plaintiffs in error's brief:

“The Supreme Court of Texas has held that under the Act of 1836, in force at the date of the execution of these two deeds, the burden of proof of such fact is on those holding under the senior chain of title.”

That is, the senior purchaser had to prove affirmatively that the junior purchaser was a purchaser in fraud.

The State of the Record on the Second Trial.

On the second trial, the defendants in error attacked the deed from Felder to Daniel as a forgery, and plaintiffs in error produced no evidence that such deed was ever executed. There was no proof that William A. Daniel had ever asserted any claim of ownership under it. The lower court held that there were no supporting facts or circumstances of sufficient probative value to submit such an issue to the jury.

It was further established by undisputed evidence that William A. Daniel died in the year 1849 or 1850, without any evidence tending to show that he ever heard of the reputed deed to himself from Charles A. Felder. Neither William A. Daniel nor anyone under him, as the evidence shows in the present record, ever claimed that such a deed had ever been made or ever claimed any benefits under such a deed.

The present record shows affirmatively that the Houston Oil Company is not connected with the deed purporting to be from Felder to Daniel of date June 10th, 1839. The evidence without dispute, as reflected by the record, establishes the fact that the plaintiffs in error are claim-

ing under a quit-claim deed made in 1855, purporting to transfer three leagues of land, including this, for a consideration of \$100.00, from one *William Daniels*, who is affirmatively shown to have no connection whatever with *William A. Daniel*, who had been dead five years before that deed was made. This evidence is positive and without dispute.

None of these facts appeared in the first trial of the case wherein defendants in error took it for granted that the William Daniels who made the quit-claim deed in 1855 was identical with William A. Daniel.

Moreover, the purported deed from Charles Felder to William A. Daniel upon its face showed that it was not properly authenticated for record, if it had been recorded in Liberty County, because it purports to have been acknowledged before William Myers, a notary public, and at that time a notary public was not authorized to take acknowledgments to deeds in Texas; and it was shown by the evidence that William Myers was not in fact a notary public at that time. (See *McCelvey v. Cryer*, 28 S. W., 691.)

Hence, if this deed had been regularly recorded in Liberty County, it would not have been constructive notice. (*Hill v. Taylor*, 77 Texas, 295; *Reverra v. Wilkins*, 77 S. W., 608; Act January 18th, 1839, Paschal's Digest, Art. 4974; *Hartley's Digest*, 3760, quoted under "Seventh Point," *infra*, showing who were at the time authorized to take acknowledgments to deeds in Texas.)

Therefore, plaintiffs in error's statement on page 2, to the effect that "*much of the controversy in this case arises by reason of the destruction of such (Liberty County) records,*" is incorrect, and that matter wholly immaterial to any issue in this case, because the deed pur-

porting to be acknowledged before a notary public, if it had been recorded in Liberty County, would have been an illegal and invalid record, incapable of imparting constructive notice of such deed to John A. Veatch, when he purchased on June 18th, 1839. But aside from this, we assert that there is no presumption to be indulged that the deed from Felder to Daniel was ever recorded or filed in Liberty County. The Menard record of this instrument offered by plaintiffs in error shows its first and *only record to have been in Menard County, on February 23rd, 1842, three years after Veatch purchased the land from Felder (R., 68, 340-342), and nearly one year after Veatch had sold the land to Col. James Morgan. (R., 73.)*

If the Daniel deed had ever been recorded in Liberty County, it would have had that clerk's file mark and attestation on it, as the clerk, in making the record in Menard County, would have recorded the entry of the prior record in Liberty County if such had existed, as the entry of the prior record in Liberty County on the Veatch deed was recorded by the clerk of Menard County in recording the Veatch deed on the 16th day of September, 1841. (R., 68-70.)

It is thus affirmatively shown that the first record of that deed was in Menard County.

It will therefore be apparent that it is immaterial whether there was admitted in evidence or not a certified copy of the Menard record of the Daniel deed, or whether there was sufficient evidence to raise the issue of the execution of that deed, or whether the plaintiffs in error were connected with that deed, because under the settled law of the State of Texas at the time Veatch purchased, in the language of the Act of 1836: "No deed • • •

shall take effect as regards the interests and rights of third parties until the same shall have been duly proven and presented to the court, as required by this Act, for the recording of land titles"; and because under the law laid down by the Supreme Court of Texas in *Kimball v. Houston Oil Company*, 100 Texas, 336, and the same case in 103 Texas, 94, it is held that "the first deed being unrecorded when the second was executed, the deed to Parmer (Veatch) conveyed the title, unless those who claimed under the deed from Brown (Daniel) should prove that Parmer (Veatch) had notice of the deed to Brown (Daniel) when he bought, or that he did not pay a valuable consideration for the land." (Id., 103 Tex., 94.)

We will now proceed to answer the opposing contentions *seriatim*:

I.

The first and second specifications affirm that petitioners deraign title under a deed from William A. Daniel. In truth and in fact, there is no evidence in the record to sustain this assertion.

The next statement in these specifications is that said deed to William A. Daniel has remained unchallenged and supported by a consistent claim of title thereunder "for more than seventy years." And it is asserted:

"Petitioners and their predecessors in title have claimed under this deed since 1839—more than seventy years."

This statement is utterly without support in the record, and is affirmatively shown to be untrue.

The original statement in first specification in the petition for certiorari is that no claim has been asserted upon

the part of respondents and their predecessors in title "during said period."

This statement is likewise wholly untrue and without any support whatever from the record.

Having recited these statements *as true (when they are not true in any respect)*, the specification of error lays down the following:

"Such facts were sufficient to entitle petitioners to have the issue of execution of the deed from Felder to Daniel submitted to the jury, and the court erred in refusing to so submit it."

Respondents will now review all of the facts in the record upon these points, and demonstrate to this Honorable Court the truth of the averments here made in criticism of the petition upon which the writ was granted and the case now presented.

FIRST POINT.

(Relating to the proof of the William A. Daniel deed and the asserted claim of petitioners thereunder.)

(1) There was no legal evidence that Charles A. Felder ever deeded the land in controversy to William A. Daniel, or that William A. Daniel ever asserted the slightest claim of ownership to the land during his lifetime, or that anyone under him has ever asserted any claim of ownership since his death.

(2) The petitioners are not connected with the purported deed from Charles A. Felder to William A. Daniel. The petitioners' sole claim of connection rests upon a quitclaim deed from William Daniels, who was a different man, with no relationship to William A. Daniel, made five

years after the death of William A. Daniel, for a recited consideration of \$100.00, and purporting to quit-claim three leagues of land, including the land in controversy.

Petitioners offered in evidence the old record book purporting to be a record of Menard County, containing what purported to be a copy of a deed signed CHARLES FELDER, and purporting to convey to William A. Daniel four thousand four hundred and twenty-eight (4428) acres of land, describing the land as "commencing on the west bank River Neches, and running thence west" without fixing any point on the west bank of the river for beginning.

The instrument does not undertake to convey the Charles A. Felder league of land by name, but after giving metes and bounds, concludes the description as follows: "It being the league of land granted George A. Nixon, Commissioner of Zavalla Colony, on 29th of August, 1835." The name "Charles A. Felder" was written in the face of the deed, both in the granting and warranty clauses, and the certificate of acknowledgment contained the name "Charles A. Felder." (R., 340-1.) The acknowledgment purports to have been taken before William Myers, a notary public, Jasper County (R., 342), who was not a notary public on that date. See certificate from the office of Secretary of State. (R., 366-7-89.)

That Wm. Myers was not a notary public is now more abundantly established by the exhibit attached as an appendix at the end of brief for plaintiffs in error, as we shall undertake to show.

(a) The certificate introduced on the trial below by the defendants in error in aid of the court's judicial knowledge *shows that Wm. Myers was not a notary public*

of Jasper County in 1839, when he purported to have taken the acknowledgment to the alleged deed from Felder to Daniel, but he was District Clerk of the County.

Under the law in force in 1839, Jasper County, in which the acknowledgment purports to have been taken, was legally entitled to but *one* notary public in addition to the Chief Justice of the county, who was ex-officio a notary public. The Act of May 15, 1838, which was the law then in force, is as follows:

“Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, that there shall be appointed for the county where the seat of government is, or shall be located, two notaries public in addition to the Chief Justice of said county; and, also, one additional notary public in each county of the Republic; which appointment shall be made by the President, by and with the advice and consent of the Senate.” (See Hartley’s Dig., Art. 2593, 1 Gammel’s Laws of Texas, p. 1480.)

This statute is quoted on page 63 of brief for plaintiffs in error.

We may remark here that at the time of the passage of this law the seat of government of the Republic was located at Houston, in Harris County, subsequently changed to Austin, in Travis County. It will be noted from the certificate filed by plaintiffs in error, and made an appendix to their brief, that *five* notaries public were appointed for Jasper County, and all were confirmed by the Senate of the Republic *on November 21st, 1839*—four more than the county was entitled to. The certificate does not show which *one* of these qualified under such appointment, but it is shown affirmatively that *Wm. Myers was District Clerk.*

But let it be conceded that Wm. Myers was so appoint-

ed, and that he accepted the appointment, the certificate shows further that his nomination was not confirmed by the Senate until 21st of November, 1839. The purported acknowledgment of the Daniel deed was taken by him on June 10, 1839, *more than five months before his appointment was confirmed by the Senate*. The recognized rule is as laid down by the authorities that—

“Where the appointing officer or body is authorized to make the appointment only with the consent of some other body, there can be no appointment until such consent has been given; the appointment does not take effect prior to such consent, subject to be defeated by the non-concurrence of such body.” (See 21 Am. & Eng. Encyc. of Law, p. 346, and cases cited.)

Therefore, it is plain that Wm. Myers did not *in any event* become a notary public until after 21 November, 1839, more than five months after the purported acknowledgment was taken.

(b) Again, plaintiffs in error assert that a *de facto* officer could take an acknowledgment, meaning thereby to affirm that Wm. Myers was at least a *de facto* notary public. This we deny. Accepting the statement of the certificate filed by them as true, and conceding for the sake of argument that Wm. Myers was appointed a notary public, he did not become either a *de jure* or *de facto* notary public until confirmed by the Senate on 21 November, 1839.

This is definitely settled by the case of *Brumby v. Boyd*, 66 S. W. (Tex.), 874, 876, 877, 878.

In that case, by resolution of the City Council of Houston, passed over the objection of the mayor, Dr. Brumby was authorized to perform the duties of health officer of

the city. Subsequently, in vacation, the mayor appointed Dr. Boyd to the office of city health officer, but without the concurrence of the City Council. The city charter provided that "in case of a vacancy in any elective office" (there being such vacancy in this case) "from whatever reason, the council, upon the nomination of the mayor, shall fill the vacancy by the selection of some person by a vote of a majority of the aldermen elected and qualified." The court held that the election of Dr. Brumby by the vote of the aldermen, without the nomination of the mayor, was void, and that the appointment of Dr. Boyd by the mayor without his election by the aldermen was also void, and that neither Brumby nor Boyd was either a *de jure* or a *de facto* health officer.

So, then, it affirmatively appears that Myers was in no event either a *de jure* or a *de facto* notary public when the purported acknowledgment of the deed from Felder to Daniel was taken. Consequently, it must follow that there could be no such thing as a certified copy from any record of such deed.

(c) It is urged on behalf of plaintiffs in error that, because the purported deed from Felder to Daniel remained on the record of Menard and Tyler Counties for more than ten years, thereby such record became validated. This by virtue of the Act of 1907, which is quoted on pages 66 to 68 of brief for plaintiffs in error.

It will be noted from this Act that the improper registration of those deeds which have remained on the records for ten years are validated "*provided no claim adverse or inconsistent to the one evidenced by such instrument shall have been asserted during that ten years.*" The Circuit Court of Appeals settles this contention as follows:

"That statute by its terms does not apply as against a prior recorded conveyance under which an adverse claim to the land described in it was asserted during the first ten years that the instrument needing validation was upon the record. It undertakes to validate the record of an instrument which, when it was registered, for record, was not entitled to be recorded, because not duly proven only when 'no claim adverse or inconsistent to that evidenced by such instrument shall have been asserted during that ten years.' (Sims v. Sealy, 116 S. W., 631.) That the adverse and inconsistent claim under the prior recorded deed of Felder to Veatch was asserted within that time clearly appears from the public records, which show sales and conveyances of that claim by successive holders of it during that period. The plaintiffs in error can derive no benefit from the statute referred to, as the adverse and inconsistent claim of title based upon the same grantor's prior recorded deed to Veatch is shown by the public records not to have been dormant during the period mentioned by the statute. Two other statutes which have been referred to in this connection, one enacted in 1841, and the other in 1860 (2 Gammel's Early Laws of Texas, p. 632; 4 Ib., p. 1437), each validating the record of instruments which when they were registered for record, were not entitled to be recorded, plainly have reference to instruments found copied in duly authorized books of public record, and not to instruments found copied in a book such as the Menard County book which was produced, not entitled to recognition as a legal record, except insofar as such recognition has been provided for by statute."

If William Myers had been a notary public, he was not under the law then in force authorized to take acknowledgments of deeds conveying land.

Act of January 19th, 1839:

"It shall be the duty of the clerks of the county

courts to record all deeds, conveyances, mortgages, and other liens, affecting the titles to land and immovable property, situated within the same, which shall be presented to them for record; provided, one of the subscribing witnesses shall swear to the signature of the signor, or he himself shall acknowledge the same; which proof or acknowledgment shall be made before some county court, or chief justice of the same, or before the clerk in whose office such instrument is proposed to be recorded, a certificate of which shall be made upon such instrument by the proper officer, and become a part of the record. And all laws contrary to or conflicting with this act be, and the same are hereby repealed, so far as they conflict with, or are contrary to, the same."

See Paschal's Digest of the Laws of Texas, Art. 4974, or Hartley's Dig., Art. 2760.

By the Act of February 5, 1840, which took effect 16th March, 1840, for the first time a notary public was authorized to take proof or acknowledgment of deeds. This Act is as follows:

"The clerks of the several county courts of the republic and their deputies shall be, and they are hereby authorized and required to admit to record at any time, in the form required by this act, any conveyance, either on the acknowledgment of the party or parties, or the proof, on oath, of such acknowledgment by the legal number of witnesses thereto made, in the offices of the respective clerks; or upon the certificates of some district judge or chief justice, or *notary public* of a county, with the seal of his office thereunto annexed, that such *acknowledgment* was made, or the execution of the instrument proven as required above; and any conveyance so recorded shall have the same legal validity, in all respects, as if it were proven in open court." (Italics ours.)

See Paschal's Dig. of the Laws of Texas, Art. 4975; Hartley's Dig., Art. 2768.

If any decision were necessary to show the correctness of our position under so plain a statute as that of 19th January, 1839, quoted above, it is afforded by the case of *McCelvey v. Cryer*, 28 S. W. (Tex.), p. 691.

The deed is copied in the record as "Daniels," but it was admitted by opposing counsel that "in the original record it is copied William A. Daniel." (R., 344.) It was duly attacked as a forgery. (R., 51.)

This purported deed to William A. Daniel, more than two and one-half years after its date, on the 23rd February, 1842, was recorded in the unconstitutional county of Menard. (R., 342.)

The fact that this deed was so long in finding its way to this record is within itself an evidence of suspicion against, rather than *bona fide*, claim.

We will now show that the copy of the above instrument found on the books of the pseudo county of Menard was not a lawful record, but void and of no more effect than if such copy had been found on the fly-leaf of some man's family Bible.

This is done to set at rest any possible claim which has been made by petitioners that such was a regular and valid record. (Petition, pp. 34 *et seq.*)

Menard County was a void subdivision, made by an Act of the Texas Congress, as held by the Supreme Court of Texas. This holding invalidated, of course, all the Menard records.

Subsequently, in 1844, Congress passed an act validating not all but certain of the Menard records, to wit: "All deeds and other instruments of writing which have been *proven before the proper officers* of justice of such

districts, or *other legal officers*" (italics ours). (See act quoted, pages 32-34 of brief for plaintiffs in error, Sec 11, p. 33.)

The Circuit Court of Appeals, in this case, construing the effect of this validating act upon this particular record, said:

"The instrument in question did not purport to have been so proven; the acknowledgment of it having been taken before a notary public, an officer who at the time the deed purported to have been made did not have authority to take acknowledgments of conveyances of land." (226 Fed., 435; *McCelvey v. Cryer, supra.*)

This holding is obviously correct, and there is no decision in Texas to the contrary. The cases cited by opposing counsel deal with those instruments which had been duly acknowledged before the proper officers, and not with instruments, such as this, which were not so proved or acknowledged.

The court below therefore excluded, on objection, a certified copy of this Menard record "as muniment of title." (R., 360.) And this action is not complained of by any specification of error in the petition for certiorari in this case.

The Menard record is only a *circumstance* tending to show that such a paper once *existed*. Whether it was a genuine instrument, executed by the purported grantor, must be shown by other evidence.

In the case of *McCarty v. Johnson*, 49 S. W. (Texas), 1098, 1101, it is held:

"In a country where titles are expected to be registered, the first place where trace of a lost deed is sought is among the records. If the record of the deed be regular, the statute gives to it a certain ef-

feet, which it cannot have if it has not been duly made. If it be not regular, it does not follow that its existence may not be a circumstance legally admissible as *tending to show that the thing copied also had a real existence*. Whether it was a genuine document or not is still open for investigation, and may be resolved by other circumstances." (Italics ours.) (See, also, Heintz v. Thayer, 92 Texas, 663 to 666.)

Such was the view of the law taken by the courts below. *And because there was no other evidence which showed or tended to show the genuineness and execution of this deed*, the trial court did not submit to the jury the issue as to its execution. In this holding the trial court was clearly in line with Texas decisions (Schultz v. Tonty Lumber Company, 82 S. W. R., 352, and cases cited). The court did not hold that the Daniel deed was not executed, but only that its execution was not proven.

To sustain their specification of error on this point petitioners boldly assert that there has been an active and continuous assertion of title under this Daniel deed (the sole evidence of which was the Menard record, above referred to) for more than seventy years, and non-claim on the part of the respondents and those under whom they claim for the same period of time.

Both of these statements are wholly unsustained by the record, and are directly contradicted by it, and to that we will appeal in proof of this assertion:

(a) *We will now consider first whether there were any acts or claim on the part of Charles A. Felder, the purported grantor in said deed, or on the part of William A. Daniel, the purported grantee, which show that the one had conveyed the land, and the other had taken a conveyance of it.*

It is the acts and conduct of *these parties* as the Texas courts have held which throw light upon the subject, and not the acts of those claiming the land many years afterwards. (Houston Oil Company v. Kimball, 103 Texas, 94, 103.)

The affirmative acts and conduct of Charles A. Felder, the purported grantor in the spurious deed to William A. Daniel, indicate and loudly proclaim that he made no such deed, because eight days after its purported date he does make a deed to the same land to John A. Veatch (R., 67), which has been abundantly shown to be a genuine instrument, and delivered with his deed the *original* testimonio of his grant.

As to William A. Daniel, what are the facts? We assert that there is not a scintilla of evidence in the record that he, by word or deed, or otherwise—ever at any time asserted any title to, or ownership of, this land. Neither he nor his legal representatives have ever conveyed it away. And it now stands, after more than seventy-five years, without the slightest sign or indication that they claim or have ever claimed this land.

Notwithstanding this fact, petitioners boldly assert that there has been an active, continuous and unchallenged claim to this land by William A. Daniel and those claiming under him “for more than seventy years,” with non-claim on the part of the respondents and those under whom they claim, for the same length of time. And they emphasize the time by putting it in bold, black capitals. That this long and active claim was shown by the payment of taxes, cutting of timber, mining of sand and possession by tenants.

Did Wm. A. Daniel ever pay any taxes on this land? If he did, the record fails to show it. Did he ever cut any

timber on it? No. Did he ever mine any sand on it? No. Did he ever occupy it himself or through tenants? No. Did he ever undertake by deed or otherwise to convey any part of it? No. Did he ever *do anything* to indicate his claim to or ownership of this land? If so, we challenge the petitioners to point out the fact in the record.

It is not what was done in these latter years under T. J. Word, but the acts and doings of the parties immediately connected with the transaction whose genuineness is to be proved, that constitute evidence as to a conveyance from Felder to Daniel.

In the case of *Belcher v. Fox*, 60 Texas, 529-530, Associate Justice Stayton, speaking for the court, says:

"The plea of *non est factum* filed by the appellants put the burden of proving the execution of the several deeds named in it upon the appellees, and it becomes necessary to inquire whether the deeds were so proved as to justify the court in permitting them to go to the jury.

"The land is situated in Navarro County.

"The deed purporting to have been made by E. H. Belcher to Massie bears date July 13, 1849; that from Massie to Wilson bears date April 3, 1850; and that from Wilson to Jordan, December 4th, 1850. The original deeds were not produced, affidavit of their loss having been made by agreement; the deeds were read from the record of deeds from Navarro County, subject to all legal objections which could be raised to the originals, had they been produced.

"These deeds were recorded in Navarro County in 1870; all had subscribing witnesses who are shown to be dead, and purport to have been proved for record by some of the witnesses as early as March 16, 1853, this being the date of the proof for record of the last deed named.

"The land was patented to E. H. Belcher, the

father of appellants, on September 22, 1862, and he died on October 26, 1865. The deeds all purport to have been proved for record before James McWilliams, County Clerk of Rusk County, or his deputy.

"The only evidence offered by the appellees of the genuineness of the attacked deeds, if that be any evidence, was that the persons whose names appear as subscribing witnesses to the deeds, as well as the officers before whom they purport to have been proved for record, were dead, and that they were persons of good reputation, resident in Rusk County at the time the deeds bear date, as was also E. H. Belcher.

"It further appears from the testimony of a witness that he located the land in controversy for F. N. Hanks, who claimed by a deed made to him by Jordan, of date March 9th, 1855, the execution of which was proved; but the records of the surveyor's office showed that the person who made the location made it for another person than Hanks. The location was made October 26, 1861.

"From a certificate copied into the record of the paper purporting to be a deed from E. H. Belcher to Massie, it would appear that the deed was recorded in Rusk County on September 29, 1849, but there is no evidence whatever that the deed in fact was so recorded. Hanks conveyed to Peak December 7th, 1864, but the deed was not recorded until May 20th, 1870. Peak conveyed to the appellees in June, 1875.

"The testimony of several witnesses seems to have been introduced without objection, which, it is admitted in the record, proved that the reputation of Hanks as a land dealer was bad. The appellants objected to the admission of the deeds, the execution of which was denied, upon the ground that they were not sufficiently proved, and also moved to strike out the deeds after they had been read from the record, and the action of the court in admitting and retaining the deed is assigned as error.

"We are of opinion that the assignments of error based upon those matters are well taken. There was

certainly no such proof of the execution of the deeds as the law requires. The original deeds were not produced, and strong must be the corroborating facts to authorize the holding that a deed even thirty years old is genuine when the original is not produced, and a copy from the record, or the record, is relied upon to show even the existence of the paper. Such proof, at best, is but secondary. When the deed itself is introduced, coming free from suspicion, and from the proper custody, even then facts corroborative of its ancient existence and genuineness must be proved. *Stroud v. Springfield*, 28 Texas, 663; *Newby v. Haltzman*, 43 Texas, 317; 1 *Greenleaf*, 570; 1 *Wharton's Evidence*, 732, 733; *Starkie on Evidence* (9th Ed.), 521; *Holmes v. Coryell*, 58 Tex., 685.

"When acts are relied upon as corroborative, they should be such as are contemporaneous with the life of the person who is claimed to have executed the instrument, if he lived for many years after the apparent date of the instrument, if not nearly contemporaneous with the date of the original instrument itself, be open in their nature, and such as evidence a clear claim of title consistent only with such an instrument as is claimed to have been made; the mere existence of the instrument is not enough. There was no such evidence in the case as showed with reasonable certainty that two of the deeds recorded in Navarro County in 1870 had an existence long before the time they were filed for record, nor any claim to the land was ever openly made during the life of E. H. Belcher." (Italics ours.)

We refer the court, also, to the case of *Houston Oil Company v. Kimball*, 103 Texas, 103.

In that case a deed which had been executed by O. C. Nelson, the original grantee of the land involved, to Parmer, was charged to be a forgery. Some of the evidence on which claim was made was that Barnes and Kimball, who had acquired Parmer's title, had shown no claim to said land for many years. This non-claim on the part of

Barnes and Kimball was claimed to be a circumstance in proof of the forgery of the deed from Nelson to Parmer. As to this, the court says:

“The long continued non-claim on the part of Barnes and Kimball are urged also as circumstances from which the fact of forgery might be presumed, but we deem it unnecessary to argue that proposition, *for surely counsel would not contend that the action or non-action of persons who had no part in the execution of the instrument could be taken as evidence of the fact that Parmer committed a forgery in securing the deed from Nelson.* We are of opinion that there was no evidence before the jury which would justify the court in giving the charge requested.” (Italics ours.)

And so the court holds that the facts which tend to prove or disprove the execution of a deed are the acts and conduct of the parties immediately connected with the transaction, and not the action or non-action of parties long subsequent in the chain of title. Surely, then, the acts of claim of those holding under T. J. Word, who did not connect with William A. Daniel, would not be admissible as evidence bearing on the execution of the deed from Felder to Daniel.

(b) We will now proceed to show from all the evidence *that petitioners were not connected with the purported deed from Charles A. Felder to WILLIAM A. DANIEL, of June 10th, 1839. The undisputed evidence being that William A. Daniel, the purported grantee in that deed, had been dead five years before the making of the quit-claim deed of February 5th, 1855, by WILLIAM DANIELS to T. J. Word, under which petitioners assert title.*

Five years after the death of William A. Daniel, T. J. Word, predecessor in title of the petitioners, procured a

deed from a man named WILLIAM DANIELS, of Nacogdoches County, Texas, "*in consideration of the sum of \$100.00 to me in hand paid,*" whereby he did "give, grant, bargain, sell, release, quit-claim and transfer to the said Thos. J. Word" three leagues of land: the Bradley, the Felder and the Cox (aggregating 13,284 acres, at a valuation of seven-tenths of one cent acre), and closing with the following warranty, "*against every person whomsoever claiming or to claim the same or any part thereof, through or under me, my heirs or assigns, but against no other claim of any kind whatsoever.*" It was signed as

his

follows: "William X Daniels." It was dated February 13th, 1855.

William A. Daniel was written in the face of the deed and in the certificate of acknowledgment. (R., 345-347.)

This is the instrument under which the petitioners rest their claim of title, and claim of connection with William A. Daniel.

The record shows who William Daniels, otherwise known as Bill Daniels, was:

John C. Fall, the treasurer of Nacogdoches County, born in 1841, at Chirino, Nacogdoches County, where Bill Daniels lived, said:

"Yes, sir; I knew him from childhood until the year 1861. * * * I think he died there about the beginning of the war. He was called William Daniels and Bill Daniels." (R., 674.)

"Q. Please state whether or not he was ever known as William A. Daniel.

"A. No, he was not." (R., 674-675.)

He further said:

"I know he could not write, * * * because he made a deed to me in the year 1859 for land, in which he signed his name by making a cross. And there are other deeds on record here in which he signed his name the same way." (R., 675.)

He was then asked "whether or not *you ever knew a man by the name of William A. Daniel*, living in said county."

"A. No, *I never did.*" (R., 676.)

On cross-examination he said:

"I never knew anyone by the name of Daniel or Daniels except William Daniels and his family about the time inquired about." (R., 677.)

In answer to the sixth cross, he repeats that he "*never knew William A. Daniel.*" (R., 677.)

It will be noted that Mr. Fall, the trusted officer of Nacogdoches County, was born and raised in the same village where William Daniels, who made the deed to Word, lived.

It will also be noted that excepting three years from '68 to '70 he has lived in Nacogdoches County all his life since 1841. (R., 674, top.)

The record further shows that this same Daniels made a series of deeds covering the years 1851 down to 1859, to various people to land in Nacogdoches and Van Zandt Counties, in every one of which he represents himself as William Daniels, signing the same with his mark, and two of which were acknowledged before A. B. Eubank, the same notary that took his acknowledgment to the Word deed. (R., 679-681.)

The record further shows that he was enumerated in the United States census for the year 1850 as *William Daniels*; that he was a farmer, and that *he came from the State of Tennessee*. (R., 683.)

He was again enumerated in the census of 1860 as *William Daniels*, his postoffice address being Chirino, Nacogdoches County, Texas. (R., 684.)

The proof, undisputed, from *Doc Owens*, a public official, born in 1835, and raised in the county where *William A. Daniel* lived in South Carolina, is as follows:

"Yes, sir, I knew William A. Daniel. I knew him in 1845, in Laurens district, now *Laurens County, South Carolina*. He was then a young man; had been living in Texas; appeared to be about thirty years of age." (Int. 3, R., 678.)

"He was a man of fine appearance physically, about five feet eight inches tall. He was a man of limited education, but very talkative and intelligent." (Cross-Int. 3, R., 79.)

"He lived in Texas when I knew him." (Cross-Int. 3, R., 679.)

"I was quite young when he moved to Texas, and knew him on his return on two occasions to his *old home in Laurens County*. On his return to this State from Texas, he visited my father's home, and while I was quite young, I remember him vividly." (Cross-Int. 4, R., 679.)

"Q. Is William A. Daniel, whom you claim to have known, living or dead? If living, where is he living, and if dead, when did he die, and where?"

"A. He died somewhere in the West, about 1849 or 1850." (R., 679.)

Petitioners, in their brief, pp. 43 and 47, quote from an old deposition, used by consent in this case, a statement from T. J. Word, in answer to the third interrogatory that Daniel "claimed to hold the same as trustee for said David Brown." (R., 325.)

There was no such evidence admitted in the trial. When it was first proposed to be offered in evidence it was objected to, whereupon the following occurred:

“*Mr. Kennerly:* We will withdraw that part of the answer for the present.” (R., 325.)

Another portion of the same answer was objected to, and this occurred:

“*Judge Kennerly:* We withdraw that part of the answer at this time.” (R., 375.)

Later on in the trial, Mr. Kennerly, petitioners’ counsel, re-offered it. (R., 359.)

It was objected to as follows:

“*Mr. Whitaker:* We do not object to that sentence which says ‘I found also that several other persons had deeds on record for the said league of land.’ The balance of it (Int. 3) we do object to, because that would be permitting them to prove title by other than the prescribed method,” etc. (R., 359.)

The *Court*, after comment, said:

“I sustain the objection.” (R., 360.)

“Defendants except.” (R., 350.)

There was no complaint in any assignment of error at the action of the court *in excluding the balance of the answer to Int. 3*, after the statement “I found also that several other persons had deeds on record for said league” (R., 325 and 359). Notwithstanding the fact that defendants in error have heretofore called attention to this misstatement of the record counsel for plaintiffs in error still persist in making it.

II.

SECOND POINT.

(Relating to the claim of petitioners under T. J. Word, beginning in 1855.)

The undisputed proof shows that the petitioners de-raign their claim of title under the William Daniels deed to T. J. Word, and all their acts of claim to the land are referable thereto, and have no connection with the alleged deed from Felder to William A. Daniel.

The assertion of claim to the land with which the petitioners are concerned is a quit-claim deed from "Bill" Daniels to T. J. Word in 1855. And this deed, instead of being a claim to the land, shows on its face that it was a *non-claim or disclaim* on the part of William Daniels. The face of the deed shows that it was an act of quit-claiming to Word three leagues of land for a consideration of \$100.00, less than seven-tenths of one cent per acre, and warranting the right against himself or heirs, "but against no other claim of any kind whatsoever."

Word's depositions show that he first became acquainted with the locality of the Charles A. Felder league of land in the latter part of 1854. (R., 323.) He had previously, in connection with John Smith, bought the interest of Mary Brown in the estate of her father, David Brown. (R., 323.)

There was offered a reputed deed (attacked as a forgery) from Charles A. Felder to Joshua Smith, under whom Mary Brown claimed, May 21st, 1840. (R., 630.) However, this deed was excluded from the evidence. (R., 667.)

And after Mary Brown Frazier had deeded to Word

and Smith by warranty deed in 1854, she secured from them a "defeasance" deed January 19th, 1855. (R., 681.) So that the deed she and her husband had made as a general warranty should thereafter "be considered and held as containing a special warranty against the grantors and those claiming under them, and no others." (R., 683, top.) In which defeasance it was declared that "*only the title which the said Mary E. Frazier and her said husband may have had in and to said lands*" should be considered conveyed to them. (R., 682.)

Word acquired and held the claim to this land along with a vast number of other leagues, "something like twenty-five or thirty leagues of land, * * * something over 100,000 acres of land." (R., 320.) And in his deposition shows that he paid taxes on this league, together with other lands, "from 1854 to 1866," and redeemed this from the State for the years 1848 and 1849, when it had been sold as the property of David Brown. (R., 329.)

It is too plain for argument that these acts of claim made by T. J. Word were made under the deed from William Daniels to T. J. Word, and under T. J. Word's claim from Mary Brown Frazier.

We assert with confidence that there is no act of claim on the part of T. J. Word, or those holding under him, that could be in any way attributed to the purported deed from Charles A. Felder to William A. Daniel.

At sundry times down to the institution of this suit different claimants in the chain of title under Word paid some taxes on said land. *There is no evidence that any*

taxes were paid thereon by the claimants in said chain of title from 1869 to 1885—nineteen years—until Doucette commenced looking after these vast tracts of land for the Irvins in 1885. There is no proof that any taxes were paid by George F. Moore or Susan Moore or J. P. Irvin or E. A. Irvin, until Doucette's employment in 1885.

John P. Irvin's testimony appears in the record (R., 375 to 381.) He nowhere says that he ever paid any taxes on this land.

Doucette began working for Irvin, who claimed a vast quantity of wild lands in East Texas (R., 381, top), in February, 1885.

“Q. What were your duties?

“A. Well, just to keep the lines open; keep off trespassers off the land. Lease to squatters, if any, *sell enough timber to pay the taxes and expenses every year.*” (R., 383, bot.)

In this manner “I paid the taxes for Irvin from 1885 until 1894, until it was sold to the Texas Pine Land Association.” (R., 384, top.)

But there is no evidence in the record to sustain the asertrion made by petitioners that respondents and those under whom they hold did not pay the annual taxes for these years.

In *Miller v. Bronson*, 50 Texas, 583 to 597, it is said:

“Certainly the mere fact that appellants paid taxes upon the land does not tend to prove that taxes were not also paid by appellee.”

“The mere absence from the record of all evidence on the question as to whether appellees paid the taxes on the land in question or not, does not afford the slightest presumption in law that he has not in fact paid all the taxes regularly.” (*Clark v. Smith*, 59 Texas, 275, 280.)

III.

THIRD POINT.

(Relating to the assertion of claim of the respondents, and those under whom they claim, originating in the deed from Felder to Veatch.)

The record shows, without dispute, an active claim of ownership of the land on the part of the respondents and those under whom they claim, beginning at the date of the deed from Charles A. Felder to John A. Veatch, and continued to the institution of this suit.

Beginning with Charles A. Felder, to whom the land was granted, on the 18th day of June, 1839, just eight days after the purported deed from Charles Felder to William A. Daniel, we find that he went before John Bevil, Chief Justice of Jasper County, and acknowledged the deed to John A. Veatch, conveying his headright, as a colonist, for the sum of \$1500.00, and warranting the title. (R., 69.)

This original deed is still preserved, and is in this record (R., 67); and accompanying which original deed was the original duplicate Spanish grant made to Charles A. Felder. (R., 63.)

The handwriting of Chief Justice Bevil, who wrote the certificate of acknowledgment attached to the deed, was proven to be genuine by his grandson, J. R. Bevil. (R., 95.) The good character of John Bevil was also proven. (R., 793.)

John A. Veatch was also proven to be a man of "sensitive honor, and jealous of his reputation." (R., 794.) It was proved without dispute that he lived in Texas until about 1849, when he moved to California, and lived in

California and Oregon until he died. He practiced medicine in Jasper County (where this deed was made and authenticated) before going to California. (R., 105.) He was an officer in the Mexican war. (R., 105.) He was a geologist, and chemist, also, and was a teacher of these sciences in California and Oregon until the time of his death. (R., 124.) Tributes to his high character were paid at that time by the Governor of the State and a United States Circuit Judge. (R., 129.)

John A. Veatch recorded the deed from Charles A. Felder to him on October 21, 1839, in Liberty County, where the land lay. (R., 69.) It was also re-recorded in Menard County on Sept. 16, 1841 (R., 70), and in Hardin County June 18, 1889. (R., 69.)

On March 15, 1841, for a recited consideration of \$5000 paid, John A. Veatch conveyed this league of land by a general warranty deed to James Morgan. (The original instrument is still in existence, and was introduced in evidence.) This deed was filed for record the 16th day of September, 1841. (R., 73 to 75.)

James Morgan, Secretary of the Navy of the Republic of Texas, and a man historically known in Texas for his unimpeachable integrity and high character, conveyed a portion of this league on October 17, 1844, to William D. Lee. (R., 75-76.) Lee conveyed it to Benjamin Green on October 9th, 1846. The deed was recorded in Hardin County, Texas, June 18th, 1889. (R., 78-79.) Green conveyed it to Washington September 9th, 1848, and it was recorded first August 9th, 1849, in Tyler County, Texas, and again in Hardin County, on June 18th, 1889. (R., 81.) And Washington conveyed it to William Walker on September 22nd, 1848, by deed recorded August 17th,

1849, in Tyler County, and again recorded June 18th, 1889, in Hardin County. (R., 84 to 87.)

On account of the peculiar verbiage of this deed, William Walker had difficulty in locating his land.

John A. Walker, his heir, testified:

"I have written to several men to try and locate where the land was and what chances there was for me to recover it." (R., 92.)

Again:

"My father started in 1877, and my grandfather started in 1860. He inquired about it in 1860, and I saw letters from my father written in the 70's," etc. (R., 92.)

Again:

"When I was a small boy I heard my grandfather say he owned land in Texas, and heard my father say he owned it." (R., 93.)

It was shown that John A. Walker was suing for a portion of this league not in controversy, describing it as 1850 acres in the southern portion of the league. (R., 749-750.)

All of this assertion of claim was under the deed from Charles A. Felder to John A. Veatch.

Although the record of Tyler County disclosed that the deed from James Morgan to W. W. Swain, dated November 21st, 1844, was a copy of a copy, and therefore inadmissible to show a conveyance, yet this record of this copy recorded May 22, 1856, was admitted as a circumstance bearing on the issue of the existence and execution of the deed, and necessarily evidenced *claim* on the part of respondents holding under Wm. M. Goodrich, who claimed thereunder.

W. W. Swain, claiming under this deed, on January 25th, 1846, conveyed by deed that part of the land claimed by William M. Goodrich to Robert Rose, which was recorded in Tyler County October 5th, 1858. And Robert Rose conveyed it to John N. Rose August 4th, 1854. Deed recorded August 3rd, 1859, in Tyler County. (R., 165-7.) And John M. Rose deeded it to William M. Goodrich, the father of some of the respondents in this case, on January 12th, 1871. Filed for record the 21st of February, 1871, in Jefferson County, Texas. (R., 169-170.)

This deed was also recorded in Hardin County in Book "I," which was destroyed in 1886, but the proof of it was found in the index of that volume, which was not destroyed. (R., 171.)

Goodrich lived in New York, and died in 1881, leaving a family of children, some of whom were in Europe. (R., 180.)

An old abstract of this land appears to have been made by Goodrich's agents, Trueheart & Company, about the year 1872, showing the condition of the title as investigated by his Texas agents. (R., 193 to 198.)

His daughter, Mary, swore:

"I know my father claimed an interest in the land in Texas in the Felder league during his lifetime and up to the time of his death. I acted for my father as secretary in writing letters and copying documents which referred to this property. I have seen the deeds referred to in Int. 6, or copies of the same, in my father's possession, but I do not know where those documents are, or what became of them, except that I believe that those which were not sent by him to his Texas agents were destroyed by my mother after my father's death." (R., 200.)

"He had a number of such agents in Texas, to wit: Charles Fitz, William B. Denson, H. M. Trueheart &

Company, of Galveston, John N. Rose and G. H. Pendarvis." (R., 199-200.)

Again:

"I have heard my father talk to my mother about this property, and claim that it belonged to him. I know that he conducted voluminous correspondence with his agents in Texas with regard to this property. I have seen hundreds of letters relating to this property which passed between my father and his agents. At my father's dictation I wrote letters to his agents relating to this property. He had extensive correspondence with John N. Rose, extending over many years." (R., 202.)

In answer to the fourth cross-interrogatory the witness says she has no tax receipts "covering taxes paid by Mr. Goodrich on his land in Texas. *Taxes were paid by his agents.*" (R., 203.)

Again she says, in describing the action of her mother in a fit of exasperation, in burning a lot of documents and papers relating to the Texas property:

"No revenues were coming from Texas, *and only taxes were being paid out.* * * * She burnt these papers on her own authority, and without consulting the heirs. This act of hers has caused the heirs much trouble through loss of papers in subsequent litigation concerning our Texas matters." (R., 206.)

On page 207 of the record is a list of her father's family, showing that they were widely scattered, several of them living in Europe.

On page 207 of the record she says:

"William M. Goodrich always claimed this land during his lifetime, and his heirs have continued to claim it since his death. They have used their earliest convenience to press their claim." (R., 208.)

Such, in brief, are some of the facts showing persistent and consistent claim of ownership to this land on the part of the Goodrich respondents.

The record shows on the part of the Morgan heirs the following:

Colonel Morgan died in the year 1866 (R., 217), leaving a number of grandchildren, the issue of deceased children. (R., 218 to 220.)

On March 12th, 1863, three years before his death, he conveyed to his granddaughter, Ellen Lee, an undivided one-half of 1850 acres of the Felder headright. This deed was duly acknowledged and recorded on the 16th day of May, 1866, in Tyler County, Texas. (R., 228-229.)

On the 7th of October, 1865, less than one year before his death, he conveyed to his granddaughter, Ellen Lee, the other one-half of said 1850 acres of the Felder league. And this deed was duly recorded on July 4th, 1866. (R., 630-631.)

This granddaughter afterward became Ellen Lee Mason, and sued the Houston Oil Company of Texas and its receivers, and recovered this land; and the record of that appeal was read from many times during the progress of the trial of this case.

The Federal Court at Houston, Texas, gave her a decree for the land, and it was affirmed by the United States Circuit Court of Appeals at New Orleans, in 1909. (107 Fed., 1021.)

So far as this record shows, she or her vendees are now the owners of that portion of this league under that decree, held under the same chain of title with these respondents.

On pages 59 to 62 of the brief filed in this cause, by the same counsel who have prepared the petition for writ of

certiorari, is a statement of the facts found and determined in that case.

Commodore James Morgan left a will naming executors and devising his estate to his grandchildren. (R., 210.) His children all died before he did. (R., 217-218.)

How does this comport with petitioners' statement that neither Commodore Morgan, his children nor his grandchildren ever laid any claim to this land? But we have more still:

It is an historical fact that much confusion, doubt and uncertainty prevailed in the administration of the laws in the Southern States in the years immediately following the Civil War; and it is further known to this court that Texas was not restored to its full place as a member of the Union until March 30th, 1870.

Some time prior to 1872, the exact time the record does not show, the executors of James Morgan's will, Gillette and Ball, instituted a suit in the District Court of Hardin County, Texas, to recover from George F. Moore, petitioners' predecessor in title, the Charles A. Felder league of land, in which suit the deposition of T. J. Word was taken in 1872, and the same was used on the trial of this case. (R., 322 to 330.) This suit continued on the docket until October 26th, 1885, when it appears to have been dismissed for the want of prosecution, neither party appearing, and the cost incurred by each party taxed against them respectively. (R., 330-31.)

Why this was done, the record does not disclose, and the conclusion drawn by petitioners that this shows any abandonment of the Morgan title is not justified by the surrounding circumstances and subsequent facts. We can, at least, with as much reason assert that George F. Moore, recognizing the invalidity of his title, failed to

appear and defend it, and so conceding the validity of the Morgan title, and the trespass having ceased, the litigation ended.

Certainly if this state of facts does not show a real and consistent claim of title to this land under the Veatch-Morgan title, we are at a loss to understand what it takes to make such claim. Those claiming in that chain of title have again and again conveyed portions of this land as their property, thereby asserting their ownership of it. These instruments have been spread upon the public records of this State for many years. Suits have been instituted to recover the land from adverse claimants, and when the issue was tried, judgment has always been recovered by those claiming in the Veatch-Morgan chain of title.

Nothing more could have been done by Commodore Morgan and those claiming in his chain of title other than to have gone on the land and actually occupied it. This they were not required to do. Notwithstanding the broad claim of petitioners that they and those under whom they claim had been in possession of the Felder league, and had been exercising their acts of ownership "for more than seventy years," we assert as a fact that the record does not show any real or appreciable invasion of the true owners' possessions of this league of land from the time it was acquired by John A. Veatch on June 18, 1839, until years after the death of Commodore Morgan, in 1866. There is no pretense or claim that petitioners or those under whom they claim either by themselves or through tenants, ever had any possession of any kind of this land prior to 1894, when occasional acts of depredation were committed by them in removing sand and cutting timber. Much ado is made by petitioners because

Commodore Morgan did not many years ago take legal action to remove the claim to this land asserted by petitioners. There is not a hint in this record that Commodore Morgan ever knew or had reason to believe that his title to this land was questioned, or that there was an adverse claim to it by anyone. Then by what rule of reason or of law was he, his children or his grandchildren, or those claiming under him, required to move against a claim not asserted or known to them to be asserted? The constructive right of possession of the Veatch-Morgan title, true title, was undisturbed, even if he had known of the false and fraudulent claim of petitioners, or their predecessors in title. The fact that petitioners, or their predecessors, were claiming under a different title from Morgan would not charge the latter with notice of such claim without an invasion of the true owners' possession. Was there any such invasion? We confidently affirm that the record fails to show anything which would amount to an open assertion of an adverse claim during Commodore Morgan's life. The only testimony given as in the remotest bearing upon this point is contained in the deposition of T. J. Word. He says that he became acquainted with this Felder league in November, 1854 (R., 323), when he found some persons by the name of Hare claiming some right to a ferry on Big Alabama or Village Creek, and he leased the ferry to them. (R., 324-325.) No claim is shown to have been made to the land; the ferry was soon abandoned. (R., 328.) That he further found two persons, Massey and Forbs, occupying a portion of the survey of land adjoining the Felder, not the Felder, and claiming a preemption which ran over on the Felder. That he leased to them. (R., 328-329.) But there was neither record of these leases nor possession or occu-

pancy of the Felder under them. Also, he states that he gave one Callaway the right to cut some timber on the Felder. (R., 328.) Whether there was ever a stick cut by Callaway is not known. None of these acts are shown to have been known to Morgan, nor those holding under him, and if known, did not require any action on his or their part.

Cannot it be asserted, with greater reason, that it was the duty of those claiming in petitioners' chain of title to take legal action? The Veatch-Morgan title was promptly and duly spread upon the proper public records, where it has since remained. It was *presumptively* and *prima facie* the better title to this land. To overcome this presumption and *prima facie* case, extraneous evidence, showing that Veatch was not an innocent purchaser for value, was required. This is conceded by petitioners. Such being true, then the obligation to move by proper legal action rested upon petitioners or their predecessors, and not on respondents. The case of the latter was made out on the face of the record, and could only be overcome by evidence produced by petitioners.

IV.

FOURTH POINT.

(Relating to the evidence which establishes the forgery of the purported deed from Felder to William A. Daniel.)

The evidence, without dispute, not only fails to show that Felder ever executed a deed to William A. Daniel, but establishes without controversy that the purported deed spread upon the Menard record in 1842 was a forgery.

Thus far we have treated the question as to whether there was any evidence which would require the trial court to submit to the jury the question as to whether there was such a deed as that from Charles A. Felder to William A. Daniel executed. We have seen that the only single fact which bore upon this question was the existence of an irregular and void registration of what purported to be a conveyance from Felder to Daniel. This record, as we have seen, was barely a circumstance of the *existence* of such an instrument, and no proof whatever of its genuineness or execution. Therefore the trial court was right in excluding this deed as a proven instrument. (*Schultz v. Tonty Lumber Company, supra.*)

But respondents went further on the trial of the case, and brought evidence which we confidently believe proved such deed to be a forgery; and to this we will now call the attention of the court. No reference whatever is made to it in the petition for writ of certiorari.

The Forgery of the William A. Daniel Deed.

This matter has been incidentally treated under Third Point, *supra*.

There was produced from the proper custody the original deed from Charles A. Felder to John A. Veatch, coming down through the proper channel to this day, more than seventy-five years, accompanied by the original testimonio delivered by the Mexican Commissioner as evidence of the grant.

The original deed from Felder was acknowledged by Felder before John Bevil, Chief Justice of Jasper County, Texas, an officer authorized under the law to take the acknowledgment and the certificate of acknowledgment endorsed on the deed shown to bear the genuine signature

of John Bevil. (See testimony of J. R. Bevil, grandson of John Bevil, R., 95 *et seq.*) John Bevil was a prominent man in Texas history. He was one of the signers of its Declaration of Independence, and occupied other high office, and was shown to be a man of good character. (R., 793.) Veatch, the grantee in the deed, was shown without contradiction to have been an honest and upright man, of stainless character, and sensitive of his honor.

Veatch had the deed promptly spread upon the records of Liberty County, in October, 1839, a few months after its execution. He retained the original, and this he delivers to James Morgan when he conveys the land to him on March 15th, 1841, less than two years after he acquired the title, and Morgan's deed was promptly spread upon the record.

That this deed is genuine is the established "law of the case." (Houston Oil Co. v. Goodrich, 129 C. C. A., 488.) The trial court, on the first trial of the case, held it to be genuine. The Circuit Court of Appeals, on the writ of error from the first trial of this case, declared it to be genuine, although the judgment of the trial court was reversed upon the question of limitation. No effort was made by petitioners to have the Circuit Court of Appeals change its ruling upon this point. Again, on the second trial of the case, the trial court found that the instrument was genuine, and on substantially the same evidence. On the writ of error prosecuted from this trial the Circuit Court of Appeals' finding that the evidence was substantially the same, sustained its former ruling upon this point. We will assume, then, as every court which has ever heard and considered the evidence has found, that the deed from Felder to Veatch is shown to be a genuine

instrument. See full treatment of this subject under third specification of error.

This being true, we then announce the following as a correct proposition of law entirely supported by reason:

“Where a purported conveyance is offered as having been made by a grantor to one person, and it is shown that the grantor has conveyed the same land to another by a subsequent deed, and such second purchaser proves his title, then the first deed, even though thirty years old, must be proven, because in such a case the presumption arising from the antiquity of the deed is destroyed by an opposite presumption; for no man shall be supposed guilty of so manifest a fraud.” (See I Encyc. of Evidence, p. 876, note 86.)

The acts and conduct of Charles A. Felder, the grantor in the purported deed to William A. Daniel, were not such as to indicate that he ever executed such an instrument, because eight days after its date he did make a genuine conveyance to John A. Veatch, delivering to him the duplicate original Spanish grant to the land.

Charles A. Felder being an honest man, as presumptions will allow, would not have made two deeds to two different persons for the same land. The Veatch deed was genuine; therefore the Daniel deed was a forgery.

If Charles A. Felder was a dishonest man, he nevertheless would have exercised some prudence, and he would not have had the hardihood, because of fear of detection, to have perpetrated a fraud by giving two deeds to the same land only eight days apart, in the same sparsely settled county, and acknowledged before officers of that county, when such a transaction would probably have been known.

As said by Chief Justice Roberts in *Littleton v. Gid-*

dings, 47 Texas, 116, at that period the old settlers "knew each other at a great distance, and kept themselves informed usually about each other's transactions relating to their headrights." This land was Felder's headright.

The deed from Felder to Daniel purports to have been acknowledged before William Myers, as notary public.

It was shown that William Myers was not at that date a notary public, as we have already said. It is held in *Parker v. Waycross R. R. Co.*, 81 Georgia, 387, 8 S. E., 871, cited in 13 Cyc., 728, that:

"A presumption that a deed was forged arises where it is shown by certificate from the executive department that a person purporting to have signed the deed as a witness in the official capacity of justice of the peace was not in commission in the county where such deed purports to have been made at the date of its execution."

Again, if William Myers had been a notary public, he was not then, as we have seen, authorized to take an acknowledgment by the laws then in force. (*McCelvey v. Cryer*, 28 S. W., 691.)

We have seen that William A. Daniel has never at any time laid any claim to this land, or exercised any acts of ownership over it.

The purported deed to William A. Daniel is never found upon any record until nearly three years after its purported date. No eye has ever seen the original so far as the record shows. This shows concealment—an evidence of forgery.

The acts of petitioners and their predecessors in assertion of claim to this land cannot be referred to any claim under the true William A. Daniel, but under one William Daniels, shown to be a different man. They also claimed

under one Joshua Smith, who had a purported conveyance from one Charles F. Felder, not Charles A. Felder. The deed purporting in its body to be from Charles A. Felder, signed by Charles F. Felder, and acknowledged by Charles F. Felder. This instrument, however, was, on objection, excluded and no complaint made about it. (R., 667.)

They also claimed under a deed from one R. O. Lusk to Word, but Lusk was nowhere shown to have had any connection with the original grantee, Felder. It is not now contended by petitioners that they have acquired any right to the land under these two last named deeds (see petition for certiorari, p. 59), and we will not further refer to them except as bearing upon the question of the execution of the Daniel deed.

Comparing the Daniel deed (R., 340) with the Joshua Smith deed (R., 349-351), there will be noted a similarity of verbiage in the two deeds, and especially will be noted a peculiar expression used in each, following the description of the land in each deed, "And for the said William A. Daniel"—"And for the said Joshua Smith." This plainly shows that these two instruments were the creation of the same mind, and emanated from the same hand.

This circumstance and peculiarity afford a key explanatory of the existence of these two papers. This forger, evidently, manufactured the deed to Joshua Smith, using the name Charles F. Felder, and not Charles A. Felder, and had it recorded in Menard County on March 22nd, 1841. He did not then know that Felder had already conveyed the land to Veatch, who had his deed properly recorded in Liberty County, where the land first lay. Subsequently, on September 16th, 1841, this deed to Veatch was also recorded in Menard County, which had been

formed from Liberty. Then for the first time this forger discovered that his scheme through the Smith deed had failed, because of the prior conveyance duly recorded. To circumvent this, he then forges the deed from Charles Felder to Daniel, and fraudulently antedates the Veatch deed by eight days. The circumstances of its purported acknowledgment before William Myers as a notary public as of the date of its purported execution, Myers not then being a notary, when, besides, a notary was not authorized to take an acknowledgment until 1840, shows this fact. A notary public being authorized to take an acknowledgment at the time of the *actual* forgery of the Daniel deed, the forger was unmindful of the fact that this power had been given after the ostensible date he had put on the deed, and thereby he betrays himself. Although oldest in point of apparent date, it is in fact, youngest in point of actual time of all the deeds purporting to be out of Felder.

T. J. Word took a conveyance of this land from Mary E. Frazier. Mary E. Frazier was Mary E. Brown. This is admitted. (R., 356.) Mary E. Brown is shown by the testimony of T. J. Word to have been the daughter and only heir of one David Brown (see answer to 2nd Int., R., 323). *David Brown was shown to be a notorious crook and land forger* (see testimony of Mrs. Jane E. Jones, R., 669). This is undisputed. To the unscrupulous schemes of David Brown we can very reasonably ascribe the existence of these fraudulent deeds.

From all the evidence it is apparent that the courts below have correctly decided that there was no issue raised by the evidence of the execution of the purported deed from Felder to Daniel, because "when the evidence given in the trial, with all inferences which the jury could justifiably draw from it, is insufficient to support a verdict

for a party, so that such verdict, if rendered, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for his opponent." This is the rule, as we understand, laid down by the U. S. Supreme Court for the guidance of the Federal tribunals, and is substantially in accord with that adopted by the Supreme Court of Texas in the case of *Joske v. Irvine*, 91 Texas, 582. The opinion, after citing the decisions of the U. S. Supreme Court, says:

"From a careful examination of the cases it appears (1) that it is the duty of the court to instruct a verdict, though there be slight testimony, if its probative force be so weak that it only raises a mere surmise or suspicion of the existence of the fact sought to be established, such testimony, in legal contemplation, falling short of being 'any evidence'; and (2) that it is the duty of the court to determine whether the testimony has more than that degree of probative force.

"If it so determines, the law presumes that the jury could not 'reasonably infer the existence of the alleged fact' and that 'there is no room for ordinary minds to differ as to the conclusion to be drawn from it.' The broad and wise policy of the law, formed and descending to us through the crucibles of time, does not permit the citizen to be deprived of his property, his liberty or his life upon mere surmise or suspicion, and places upon a trained judiciary the grave responsibility of determining as a question of law whether the testimony establishes more."

V.

FIFTH POINT.

(Relating to the assertion of the petitioners that the evidence required the submission to the jury of the issue of forgery of the deed from Felder to Veatch.)

Petitioners, by their third specification of error, found on page 11 of their brief, say that the trial court should have submitted to the jury and allowed the jury to determine whether the deed from Felder to Veatch was executed.

We submit that the evidence, without controversy, establishes the execution of this deed, because an ancient instrument produced from the proper custody, free from suspicion, and which has been acted upon so as to give some corroborative proof of its genuineness, is admissible in evidence without further proof of its execution. And since there was no testimony tending to show that it was not a genuine instrument, the finding was necessarily in favor of its genuineness, and the court correctly instructed the jury to so find.

It has never been required under the laws of Texas that a deed of conveyance shall be executed in the presence of the officer; nor is it material that he should know that the signature was written by the grantor, for if the grantor acknowledges before the officer the due execution of the instrument, he thereby recognizes and adopts the signature as his own.

It is the fact of acknowledgment, and not the genuineness of the signature, that the certificate must show.

Authorities.

- Newton v. Emmerson, 66 Texas, 145.
- Willis v. Lewis, 28 Texas, 190.
- Capps v. Terry, 75 Texas, 400.
- McAllen v. Raphael, 96 S. W., 760.
- Duff v. Coal Co., 124 S. W., 309, 310.
- Clough v. Clough, 40 Am. Rep., 386 (Maine).
- I Devlin on Real Estate, formerly Devlin on Deeds, Sec. 531 and notes; Secs. 534, 533.

- I Am. & Eng. Enc. of Law, 560, 561, notes.
- I Wharton's Ev., Sec. 705, note 3.
- II Wharton's Ev., Sec. 1052.

Argument.

(1) We recognize as the correct rule "that when the evidence given in the trial, with all inferences which the jury could justifiably draw from it, is insufficient to support a verdict for a party, so that such a verdict, if rendered, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for his opponent." This is the rule as we understand laid down by the U. S. Supreme Court for the guidance of the Federal tribunals, and is substantially in accord with that adopted by the Supreme Court of Texas in the case of *Joske v. Irvine*, 91 Texas, 582, *supra*.

The counsel seem to plant themselves behind this affidavit of forgery, and rest secure in the belief, apparently, that thereby the question of forgery becomes an issue for the decision of the jury, irrespective of the force and degree of the evidence establishing the genuineness of the instrument. In short, they appear to treat the affidavit as evidence. Such is not its purpose or effect. It only serves as a pleading, upon which the issue may be raised, and merely puts upon the party offering the instrument the burden of proving it in some way known to the common law.

To meet this burden, the plaintiffs produced from the possession of one John H. Walker the original deed charged to be forged from Chas. A. Felder to John A. Veatch, executed 18th June, 1839, more than 75 years before the date of the trial of this case. That it was not a creation of recent years is established by the fact that it

was properly filed for record on 21st October, 1839, in Liberty County, Texas, where the land conveyed then lay, was again on 16th September, 1841, recorded in Menard (now Tyler) County, Texas, and again recorded on 18 June, 1889, in Hardin County, Texas, in which latter counties the land had fallen by successive changes of county boundaries, or creation of new counties.

Again, it was acted on and title asserted under it as early as March 15th, 1841, when John A. Veatch conveyed the land covered by it to James Morgan (more than 75 years before its use in evidence in this case), who in turn made conveyances to others of portions of the league, and these latter handing it on down to others, all by conveyances made more than 60 years before the trial, and spread upon the public records for as great a length of time, *all of which deeds are admittedly genuine.*

It was therefore conclusively shown to be an ancient instrument. It came from the possession of one John H. Walker, of Waterbury, Connecticut. He was the grandson of one William Walker, and states that the deeds and testimonio which he produced came from the possession of his grandfather, William Walker, to the witness' father, James A. Walker, and from the latter to the witness, showing that the witness was the proper and legal custodian of the papers and documents which had come through that source.

This, then, demonstrates and establishes the fact that *this deed came from the proper custody.*

Did it come free from suspicion, and with an honest face?

The deed bears no marks of suspicion. It was promptly spread upon the public records, and in less than two years after its execution John A. Veatch, who, if the deed

is a forgery, must have committed the forgery, on 15th March, 1841, conveyed the land to James Morgan and *delivered to him the original instrument*. Reason and observation teach us that such would not be the acts of a forger. Forgeries are concealed as far as possible, and not flaunted. It is inconceivable that a sane man would commit a forgery and immediately publish it to the world by spreading the instrument upon the public records in the neighborhood, and then within less than two years deliver the original forged instrument, the evidence of his crime, into the possession of another. It was treated by all the parties claiming under it, including John A. Veatch, as a genuine instrument. They conveyed the land covered by it running through many years. The statement by counsel for plaintiffs in error that there was no assertion of ownership is so utterly contradicted by the record that we are at a loss to understand why such a statement is made.

The deed was in honest company. As said by Judge Neill, of the Court of Civil Appeals of Texas, in *West v. Houston Oil Co.*, 120 S. W., at p. 233: "Like a man, the genuine worth of a title paper may be estimated by the company it keeps." This deed was accompanied by the genuine original Spanish testimonio executed by George Antonio Nixon granting this land to Chas. A. Felder. Whoever executed and delivered the deed from Felder to Veatch, at the same time delivered the Spanish grant. With change of names, this is a substantial quotation from the same opinion just cited. Felder was the man who was entitled to, and to whom the grant was delivered. We can therefore reasonably infer that Felder delivered it to Veatch when he conveyed him the land, and that Veatch handed it on down in this chain of title.

The deed then was free from suspicion.

We have then offered (1st) an ancient instrument, (2nd) from the proper custody, (3rd) free from suspicion, with an honest face, and in good company, and which had been acted upon so as to give corroborative proof of its genuineness. This would make the deed admissible in evidence as against the charge of forgery, and without more evidence require of the court an instruction to the jury to find for the plaintiffs.

In the case of *Stookesbury v. Swann*, 85 Texas, Judge Stayton, in delivering the opinion of the court, says, at page 566:

“If the deed was properly admitted as an ancient instrument, in the absence of all testimony showing that it was not a genuine instrument, the judgment must necessarily have been for the defendants, if there was no other question in the case.”

If it were true that there was non-claim on the part of those holding in the chain of title such non-claim would not show or tend to show that the deed from Felder to Veatch was forged. We must look to the acts of the parties immediately connected with that transaction as shedding light upon that question. Veatch treated the land as his, by conveying it to Morgan. There was no non-claim on his part. There is no evidence showing that Felder has ever laid claim to the land since selling to Veatch. So it must be that he has treated the transaction as genuine.

On the question of non-claim as tending to prove forgery in the case of *Houston Oil Co. v. Kimball*, 103 Tex., at page 103, the Supreme Court of Texas says:

“The long continued non-claim on the part of

Barnes and Kimball are urged also as circumstances from which the fact of forgery might be presumed, but we deem it unnecessary to argue that proposition, for surely counsel would not contend that the action or non-action of persons who had no part in the execution of the instrument could be taken as evidence of the fact that Parmer had committed a forgery in securing the deed from Nelson."

See, also, *Belcher v. Fox*, *supra*.

The plaintiffs below went further and indisputably showed long claim and assertion of ownership under this deed from Felder to Veatch, by conveyances under it, and by suing to recover it from adverse claimants. (R., 330.)

But, as said by the Court of Civil Appeals in the case of *West v. Houston Oil Co.*, 120 S. W., 230, 231, while possession under an ancient deed is not required in Texas to establish its genuineness, still such possession and claim of ownership may be considered in corroboration of its genuineness.

This evidence, it seems to us, was amply sufficient to meet and overcome that offered by the defendants below, and would be sufficient to show conclusively that the deed attacked was a genuine instrument. But we went further and proved by a number of witnesses, beginning at and before the execution of the alleged forged deed, and running all the way down to his death in Portland, Oregon, in 1870, lamented by some of the great in the land, that John A. Veatch, scholar and scientist, was an honest man in the highest degree, who would neither commit a forgery, nor profit by one.

This testimony was uncontradicted.

Again, the plaintiffs showed without contradiction that the deed bore an acknowledgment made by the grantor,

Chas. A. Felder, before John Bevil, Chief Justice of Jasper County, Texas, given under his official seal, and with his genuine signature attached thereto.

J. R. Bevil testified positively that the signature to the acknowledgment of the deed from Felder to Veatch was the genuine signature of the grandfather, John Bevil. Among papers mentioned by him as bearing John Bevil's genuine signature were some instruments filed in the administration of the estate of his wife, Frances Bevil.

So we see that J. R. Bevil was not only a qualified and competent witness, but that he abundantly established, without any sort of contradiction, the genuineness of the signature of his grandfather, John Bevil, the officer who took the acknowledgment.

John Bevil, in his official capacity, certifies that Chas. A. Felder appeared before him and acknowledged the due execution of the instrument. This must be taken as true until the contrary is shown.

Now, as against these undisputed facts as to the genuineness of the deed from Felder to Veatch, *what is the evidence relied upon by the plaintiffs in error?* They offer the testimony of two witnesses, Shelby and Gardner, styled experts, who, giving it the most favorable construction for the defendants below, haltingly, doubtfully and confusedly, are of the opinion that the signature to the petition for the grant as contained in the first original grant or protocol now on file in the General Land Office of the State, and which was produced solely for the purpose of comparison written over four years before, is in some respects different from the signature to the deed from Felder to Veatch. At its very best, evidence of this character is of the weakest kind, and entitled to small consideration. In *Hanly v. Gandy*, 28 Tex., 216, 217, the Su-

preme Court of Texas cites the case of *Borman v. Plunkett*, 2 McCord, 218, which holds:

"The best and most usual evidence of handwriting is that of a person accustomed to see the party write. It is by these means the character of the writing is fixed in the mind, and forms the best standard by which to determine the identity; but it will not be denied that the judgment will be powerfully assisted by the actual presence of the characters on which the standard was formed, and it follows that, in the absence of better proof, some opinion may be formed by comparing that which is acknowledged to be genuine with that which is disputed, and, feeble as it may be, it is nevertheless a circumstance calculated in some measure to assist the judgment in deducting a conclusion from other parts which are doubtful. I come, therefore, to the conclusion, as a circumstance in aid of doubtful proof, comparison of handwriting is admissible, but *per se* is so feeble as to be unsafe to act upon, and that in *the absence of any other proof it would be inadmissible.*"

And there was no other proof in this case. In *Borland v. Walrath*, 33 Iowa, 130, cited in note to Sec. 533, 1 Devlin on Real Estate, it is said:

"The evidence as to the genuineness of the signature, based upon the comparison of handwriting and of the opinion of experts, is entitled to proper consideration and weight. It must be confessed, however, that it is of the lowest order of evidence, or of the most unsatisfactory character."

And yet, with this kind of evidence, and the very weakest of its kind, the plaintiffs in error ask this court to overturn the judgment of the court below, who, having heard all the testimony, the strength of the plaintiffs and the weakness of the defendants, if there was no other reason (which we shall presently show), would have failed in his

duty if he had refused to instruct the jury to find for the plaintiffs on this question of forgery.

(2) But in view of the evidence which the plaintiffs produced as tending to establish the genuineness of the instrument attacked, if we were to now admit, and were to write into the record, the admission that the signature to the deed attacked was not the manual act of Chas. A. Felder, we are still prepared to maintain the proposition that it was the duty of the court below to eliminate from the case the attempted issue of forgery, because of the verity given to the deed by the genuine certificate of acknowledgment affixed by the officer John Bevil. And this we shall now undertake to demonstrate.

As stated in the proposition above, it has never been required under the laws of Texas that a deed of conveyance shall be executed in the presence of the officer, nor is it material that he should know that the signature was written by the grantor; for, if the grantor acknowledges before the officer the due execution of the instrument, he thereby recognizes and adopts the signature as his own. It is the fact of acknowledgment, and not the genuineness of the signature, that the certificate must show; and neither the deed nor its acknowledgment is rendered invalid by the fact that the signature was affixed by another person.

In Texas, as elsewhere, the certificate of the officer is conclusive of the facts stated, in the absence of fraud, collusion or mistake. And to overturn the certificate, the most positive and convincing testimony is required. Certainly the certificate was not impeached by the showing that Felder's signature to the deed was not his manual act, admitting this to be true.

In *Newton v. Emerson et al.*, 66 Tex., at p. 145, re-

ferring to a deed attacked as not being signed by the grantor, the Supreme Court of Texas says:

“If that instrument had been subscribed by him, there is no contention that it would not have passed to his wife all the interest he held in the property.

“It is contended, however, that as the instrument was not subscribed by him, and not written by him, that it is therefore inoperative. The admitted fact is that he produced the instrument before an officer authorized to take the acknowledgment of deeds for the purpose of making the proper acknowledgment, and that, before that officer, he asked him to certify, as the officer did, ‘that he signed, executed and delivered the foregoing deed to be his act for the purposes and consideration therein stated.’

“Under this state of facts, it is unimportant that the entire instrument, including the name Charles G. Newton, was written by another, at his request; nor is it important whether he was present when it was written; for, it is well settled that by his acknowledgment before the officer, he adopted and made his own every word, including his own name, then upon the instrument.”

In *Willis v. Lewis*, 28 Texas, at p. 191, it is said:

“It is proved, it is true, that Rees Lewis could neither read nor write; yet it is very clear that although some other person may have signed his name to the deed, if he acknowledged it, as he is said to have done, he thereby adopted it and it became his act and deed as truly as if he had signed it with his own hand.”

In the case of *Waltee v. Weaver*, 57 Tex., 571, in speaking of the acknowledgment of a married woman, it is said:

“As it is the acknowledgment and not the signature which passes the title in a conveyance by a married woman, it is of the utmost importance to give the certificate which evidences the acknowledgment en-

tire faith, in the absence of fraud or duress." (See also *Davis v. Kennedy*, 58 Tex., 517.)

In *Duff v. Coal Co.*, 124 W., 309, 310 (Kentucky), it appears that—

"The record furnishes no evidence whatever of the alleged forgery of appellant's signature to and acknowledgment of the deed, except what is contained in her deposition, in which *she denied that she had signed or acknowledged the deed, or authorized anyone to do so for her.*" (Italics ours.)

There was other evidence tending to show otherwise. The officer who took the acknowledgment was dead. Speaking of the effect of the acknowledgment, the court says:

"In the view of the verity that should be accorded the deputy clerk's certificate showing her acknowledgment of the deed, we are not prepared to say that the court erred in rendering the judgment complained of. It will not do to lightly set aside the certificate of such an officer. To authorize its overthrow, the court should have before it such evidence as will leave no doubt that the officer had been guilty of fraud or mistake."

In *I Devlin on Real Estate*, Sec. 531, the author says:

"The presumption is that the certificate states the truth. But if, through fraud or imposition it does not, it, of course, may be shown to be false. But the evidence that contradicts the solemn declaration of a sworn officer should be clear and persuasive. To impeach such a certificate the evidence should do more than produce a mere preponderance against its integrity in the balancing of probabilities; it should, by its completeness and reliable character, fully and clearly satisfy the court that the certificate is untrue and fraudulent."

The author sustains this text with a multitude of authorities.

See also, at Sec. 534, this same author says:

“The rule which requires that evidence to overcome the certificate shall be clear, satisfactory and convincing, is founded on soundest legal reason and the most salutary principles of public policy. The certificate, standing by itself, without other proof, is *prima facie* evidence of all that it rightly contains. While not conclusive, it is entitled to the utmost consideration. To say that it does not speak the truth, the evidence ought to be sufficient to leave a clear conviction in the mind of the fact. To allow the certificate to be impeached on slight grounds would be to open the door to perjury. Property might increase in value, and then after a number of years, if the grantor's own statement could impeach the certificate, the greatest injustice might be done to innocent purchasers, who would be powerless to supply other evidence than that contained in the certificate itself.”

In this connection, see Sec. 533, where the author reviews decisions by the courts of last resort on this subject.

We also have referred to other cases in the list of authorities cited under the second proposition of law, above. We could make many more quotations from authorities equally as strong as those quoted above. But we fear that the patience of the court is already exhausted. Certainly it must appear passing strange that counsel for plaintiffs in error insist that this issue of forgery was an open one in view of the authorities.

Evidence of forgery might be brought, sufficient, at least, to make the question of forgery an issuable fact to be determined by the jury, in spite of a genuine certificate of acknowledgment. It might tend to show fraud, collu-

sion, or mistake on the part of the officer. But that is not the case before this court on the record here. That, we believe, is the extent of the holding by the authorities cited and commented on by the plaintiffs in error. We have neither the time, opportunity, nor inclination to review these at length, but will content ourselves with a reference to one or two of them.

They cite the case of *West v. Houston Oil Co.*, as found in 102 S. W., 927, and quote at great length from the opinion of Judge Pleasants. We doubt, if these gentlemen had fully understood the facts in this case, and particularly the pregnant fact upon which the charge of forgery in that case chiefly rested, if they would have cited it, and certainly not with such apparent satisfaction as they exhibit. They emphasize the fact that the purported deed from McGee to Dobson, which was attacked in that case, was accompanied by the original Spanish grant, just as in this case. Did they fail to notice that this supposedly genuine Spanish grant was found to be a forgery, and, therefore, gave its tone to the deed which followed and accompanied it?

A reference to a second appeal of this same case, found in 120 S. W., 229, where all the facts are more at length set out, will show that the supposed Spanish grant was shown to be a forgery. It, as well as the deed which accompanied it, and which was attacked as a forgery, located the grant at a place and in a county other than its true location, and in a place and in a county where no such grant was ever made. At page 233 the court says:

“We think from the evidence that it is almost conclusive that the purported Spanish grant found with plaintiff’s title papers, and which must have been handed Dobson when the deed in question was deliv-

ered, was a forgery; for the appearance of McGee's name as the grantee can be accounted for upon no other hypothesis. It is, however, the deed from McGee to Dobson which defendants seek to show a forgery. Does the fact that the Spanish grant is a forgery, which sticks to it from beginning to end like the shirt of Nessus tend to show the deed in question is a forgery? When this fact is taken in connection with the other testimony, we are inclined to the opinion that it does. Like a man, the genuine worth of a title paper may be estimated by the company it keeps. Whoever executed and delivered the deed in question at the same time delivered the Spanish grant in which McGee's name appears as the grantee."

The court then proceeds to reason that it was unreasonable to suppose that McGee had executed the deed and delivered the supposed grant, because he was living on the land and knew of its location at a different place than that stated both in the grant and deed, and that therefore the whole transaction was a fabrication.

In the case of *McAllen v. Raphael*, 96 S. W., 763, where it was shown and conceded that the instrument questioned did not have the signature of the maker, but was signed by some other person, the court says:

"A person may execute a deed and make it his act by requesting another to sign his name thereto, or when another has signed his name thereto without his request, if he should adopt it as his own. Hence, when it was shown that the name of Young, subscribed to this instrument, was in the handwriting of another person, it was not of necessity a forged instrument; but, in view of the affidavit of forgery, it was, we think, incumbent upon the defendants to go further, and show by facts or circumstances an adoption of the instrument by Young, or a condition of things which would tend to remove the suspicion that the signature was an unauthorized act. If this in-

strument had no certificate of acknowledgment, but simply the name of Young signed to it as grantor, and the names of the three persons as subscribing witnesses, and the proof was that Young's name was in the handwriting of one of the witnesses, and the signature of the witnesses were shown to be genuine, together with the further proof that the men whose names appear as witnesses, including the one in whose handwriting the grantor's name was written, were men of probity, and all said persons were dead, we seriously doubt that a finding that the deed was a forgery would be permitted to stand upon such a state of evidence. But we are more firmly of this opinion when it appears, as in this case, that an officer has placed his certificate upon the instrument, certifying that the person whose name appears therein as the grantor—in this instance John Young—who was well known to him, personally appeared before him and acknowledged that he had executed it."

That was a much more recent transaction than the one under investigation here. It may well be presumed that all the parties to the transaction (in the present case, 1839), including the witnesses, have long since been dead, and their names and memory forgotten. If, under the facts stated in the opinion cited, the courts of this State would not be justified in allowing a verdict to stand finding that instrument to be forged, then surely in this case, where the evidence of the genuineness of the instrument is so much stronger, and that alleged to impeach it practically no evidence at all, it would have been inexcusable for the court below to have allowed a verdict to stand finding this deed to be forged. It therefore became his duty to instruct against the plaintiffs in error, and this upon recognized principles of law.

The apparent seriousness with which counsel for plaintiff-

iffs in error have treated this question is our excuse for taking so much space and time in answering it.

In the present record we have the same evidence on this issue as in the former, with the added fact proven that John Bevil, the officer who took the acknowledgment, was a man of the highest integrity (R., 793), and judicially known to this court as a man of prominence, one of the signers of the Texas Declaration of Independence, and occupying other high official position in the establishment of the new Republic. The defendants have also introduced in evidence a letter written by John A. Veatch to J. P. Borden (R., 642), which letter, as the court's charge says (R., 794), "carries on its face the idea that he was a man of sensitive honor, and jealous of his reputation, because the moment he heard that he was accused of attempting to secure two headrights he addressed a letter to the officer at Austin, calling attention to the fact that there were two Veatches, one spelled Veatch, and the other Veitch, and that there was an attempt to impugn his integrity by confusing him with the other man of similar name, and he invites an investigation as to his own character, and among others, he refers the officer to Sam Houston and Thos. J. Rusk. The letter shows on its face that there was nothing in his life he was trying to conceal. The circumstances assailing the deed from Felder to Veatch in the face of the overwhelming testimony as to the genuineness of the deed, are, to my mind, too meager to justify the submission of that issue for the determination of the jury."

This letter was introduced by defendants as a basis of comparison in an effort to show that Felder's name to the deed was similar to Veatch's handwriting. No witness testified to this similarity, or ventured to say that it

was the same. But even if this were so, it would be of no avail under the decision of this court quoted above, in as much as Felder acknowledged the deed.

On pages 31, 32 *et seq.*, defendants' counsel find fault with the testimony of the witnesses who testify as to the good character of John A. Veatch. As to those witnesses, Mrs. Snow, J. D. Adams, the two Drs. Raffety, and O. B. Johnson, who became acquainted with Veatch after he left Texas, along in the '50s and on down to his death, in 1870, they say that they knew nothing of his life in Texas. But human experience notes the fact that an honest man usually retains his character through life. The Supreme Court of Texas holds that evidence of the reputation of a person, though at a remote date, is admissible, at least it is within the discretion of the trial judge. So held in *Mynatt v. Hudson*, 66 Tex., 66; *Brown v. Perez*, 89 Tex., 282; *Ward v. Rice*, 93 Tex., 532.

Fault is found with the testimony of the witnesses Ralph and Beatty, who lived in the same neighborhood with Veatch in Jasper County, Tex., in the '40s, that they were too young to be qualified to speak of a man's reputation. They were both boys. Ralph had gone to school with Veatch's children. The evidence was admissible, confessedly so. As to its weight, let us suggest that a child can well recall in later life in what esteem the neighbors and friends of himself and of his family were held by the members of the community. The common experience of men sustain us in this statement. Indeed, having lived in the community where Veatch had lived, and among those who had known him, a witness who may never have seen or known Veatch might be fully qualified to testify as to his reputation in that community.

Mrs. Nellie Lowe states that she was born in 1826, and

knew Dr. Veatch from 1835 down to the time he went to Mexico, in 1846, and knew his reputation. (R., 117-118.) The occasion of Veatch's going to Mexico in 1846 was as a captain in the U. S. army in its war with Mexico. (Testimony of Ralph, R., 105.)

Counsel for defendants dwell upon the fact that they did not find W. B. Barnett and Sam'l Palmer, witnesses to the deed from Felder to Veatch. In many instances it was shown that the witnesses introduced searched records of counties organized many years after the date of the transaction in question. In several of the counties the ancient records had been destroyed. Indeed, the negative statement of the witnesses say that they did not find the names of Barnett and Palmer on the county records proves nothing. No one testified affirmatively that Barnett and Palmer were not here at the date of the deed. Every witness who testified to the negative fact of not knowing these persons, or who made statements that they did not know them, were persons who came to Texas many years after this transaction.

Again, on pages 35 and 36 of their brief, defendants' counsel comment upon certain evidence which was on the trial below excluded by the court, and properly so. The counsel for defendants offered in evidence certified copies of two deeds purporting to be made by John A. Veatch, the one made in 1840, conveying certain land to one person, and the other made in 1846, conveying the same land to another person, as they claim. Such evidence does not show or tend to show that Veatch was doing a dishonest thing, because it might well be that between the time of the first conveyance and the second he had re-acquired a title to the land, such things are common. But, as stated, this testimony was excluded, and while an excep-

tion was reserved, defendants' counsel are mistaken in asserting that the action of the court in excluding this evidence is assigned as error. In a word, this evidence is not in the record for the purposes of this writ of error, or for any purpose.

We now quote from the opinion of the Circuit Court of Appeals on the first writ of error, holding the deed genuine upon substantially the identical state of facts as now presented, save that the facts there reflected have been strengthened in behalf of the genuineness of this deed in the present record, which holding, under the decisions of the Supreme Court of the United States hereafter cited, constitutes on that point the "law of the case" and is *res adjudicata* of this issue on the second writ of error.

The court there said (129 C. C. A., 490-491):

"Was the deed from Charles A. Felder to John A. Veatch shown without conflict in the evidence to be a genuine deed? The court below held that it was, and defendants complain here of this ruling. (Page 490.)

"Upon the issue of the genuineness of the signature of Charles A. Felder to the deed purporting to be from him to John A. Veatch, the defendants introduced the original protocol, containing the signed application of Felder for the league granted to him by the Mexican Government, and the testimony of two handwriting experts, who had compared the signature to the protocol with what purported to be Felder's signature to the original deed to Veatch, and testified that the signatures did not resemble each other, and in their opinion were not written by the same person. The applicant for land grants in Texas was not at the time of the application of Felder required to sign the application in person and in his own handwriting, though presumptively he would do so. This was the evidence relied upon by defendants to sustain the issue of forgery. The original deed from Felder to Veatch was produced by a wit-

ness who was the descendant of an intermediate grantee of the land from Veatch, and therefore found in the proper custody. It was an ancient deed, free from marks of suspicion. It was found in association with the admittedly genuine original duplicate Mexican grant to Felder in the custody of the same producing witness. It bore a certificate of acknowledgment under the hand of and official seal of an ex-officio notary public of Texas, the signature to which was shown to be in the handwriting of the notary. The law of Texas did not require the signature of a deed to be written by the grantor, even by a grantor who was able to write, provided it was properly acknowledged by him. There was also evidence of the good character of the grantee, Veatch. Upon this evidence we are not prepared to say that the court below should have submitted the issue of forgery to the jury." (Page 491.)

Upon the second trial, from which the present writ of error was prosecuted, the trial court, in his charge to the jury, used this language (R., 792 to 795):

"In the outset of the case it was contended by the defendants that the plaintiffs' title should fail because of the fact, as alleged by them, that the deed from Charles A. Felder to John A. Veatch was a forgery, and it is the contention of counsel for the defendants that I should submit that matter to the jury. I do not believe there is any issue of fact on the execution of the deed from Charles A. Felder to John A. Veatch sufficient to raise a question as to its genuineness serious enough to cause the jury to have to pass on it. The deed from Charles A. Felder to John A. Veatch bears date June 18, 1839. It is more than thirty years old. In fact, the deed shows on its face at this time to be more than seventy-five years old. In the second place, the deed shows to have been properly acknowledged before an officer authorized to take acknowledgments on the date of its execution, to wit, June 18, 1839. In the third place, the

deed was filed and tendered for record on the 21st day of October, 1839. In the fourth place, the original deed was found among the papers of William Walker, who is shown to have died on Long Island very many years ago. Among his papers was found not only the original deed from Felder to Veatch, but other deeds passing title to a portion of the land to the man William Walker. Another significant thing to my mind is the fact that there was found among the papers of Walker the original Spanish grant from the Mexican Government to Charles A. Felder, as well as the original deed from Charles A. Felder to John A. Veatch, and deeds from Veatch and other grantors on down to William Walker, and these deeds all recite the fact that Charles A. Felder had conveyed the land to Veatch by deed dated June 18, 1839. It is further shown that John A. Veatch did live in Texas, and in the vicinity where the land was located, before the time of the execution of the deed, at the time of its execution, and for some time subsequent to its execution in 1839, and the deed and the Spanish grant were found in the possession of the heirs of William Walker, who had obtained title to a portion of the land. It is further shown that John A. Veatch was a man of most excellent reputation. His life has been traced through people who knew him in the early days and people who became acquainted with him in Oregon after he moved from Texas. It is further in evidence that the reputation of John Bevil, the man who took the acknowledgment to the deed from Charles A. Felder to John A. Veatch on June 18, 1839, was a man of excellent reputation. In addition to that, there is evidence of the assertion of ownership under that title by the parties. Perhaps I have not enumerated all the facts in connection with this branch of the case, but they will be fully shown by the record. They all tend strongly to show that Charles A. Felder executed the deed to John A. Veatch, and delivered it. On the other hand, the facts assailing the genuineness of the deed are extremely meager. The defendants rely on the similar-

ity of the handwriting in the deed from Felder to Veatch, together with a letter claimed to have been written by Veatch to Borden, and the similarity of the writing which they claim was written by Veatch to the name of Felder signed to the deed from Felder to Veatch, contending thereby that taking the writing signed to the application for the grant, and the writing of the name signed to the body of the deed from Felder to Veatch and the letter written to Borden show that one man wrote them all, and their contention is that John A. Veatch wrote them all. The law did not require Felder to sign the application for the grant in person. He may have given the right to sign it to someone else. There is one significant thing to the mind of the court in reference to the letter written by Veatch to Borden, and that is that the letter carries on its face the idea that he was a man of sensitive honor, and jealous of his reputation, because the moment he heard that he was accused of attempting to secure two headrights he addressed a letter to the officer at Austin, calling attention to the fact that there were two Veatches, one spelled Veatch, and the other Veith, and that there was an attempt to impugn his integrity by confusing him with the other man of similar name, and he invites an investigation as to his own character, and, among others, he refers the officer to Sam Houston and Thomas J. Rusk. The letter shows on its face that there was nothing in his life he was trying to conceal. The circumstances assailing the deed from Felder to Veatch, in the face of the overwhelming testimony as to the genuineness of the deed are, to my mind, too meager to justify the submission of that as an issue for the determination of the jury."

It will be noted that there was no exception taken to any of the facts declared in this charge. The exception simply addressed itself to the court's "refusing to submit to the jury the issue of forgery of said deed." (R., 805.)

When the case was decided on the second writ of error,

the court, speaking through Associate Justice Walker, said:

“The evidence adduced in the trial now under review bearing upon the issue of the genuineness of the deed from the original grantee of the land sued for, Charles A. Felder to John A. Veatch, which was a link in the chain of title asserted by the plaintiffs, was like that considered in the opinion rendered on the former writ of error (Houston Oil Company of Texas v. Goodrich, 213 Fed., 136; 129 C. C. A., 488), in that it was not such as to require a submission by the court to the jury of the issue of forgery. There was no evidence which furnished substantial support for a finding against the genuineness of that instrument.” (226 Fed., 435.)

It will thus be noted that on two trials before the distinguished Texas jurist Judge Gordon Russell, who presided in the trial court, and who heard every line and syllable of the evidence in the case, it was ruled that no legal evidence had been adduced to support the attack made upon the deed from Felder to Veatch.

On the first writ of error this holding was unanimously approved by the United States Circuit Court of Appeals, composed of Judges Pardee, Shelby and Grubb.

On the second writ of error, the same conclusion was unanimously held by that court, with its personnel composed of Judges Pardee, Walker and Maxey.

And these conclusions by the courts below, on both writs of error, are supported by an unbroken line of decisions of the Supreme Court of Texas in the cases cited and quoted from in our brief, *supra*.

SIXTH POINT.

There is no evidence which shows or tends to show that Veatch was not an innocent purchaser for value.

In their fourth and fifth specifications of error, found on pages 12 and 14 of their brief, petitioners assert that the evidence was sufficient to have submitted to the jury whether John A. Veatch was a *bona fide* innocent purchaser for value under the deed from Charles A. Felder, without notice of the purported prior deed from Felder to Daniel. Under the Act of 1836, which was in force when Veatch purchased from Felder, the burden of proving notice or want of consideration was on the party claiming under the *older* deed. There is no evidence in the record (a) of the genuineness of the purported deed from Felder to Daniel; (b) the evidence shows without dispute, if such deed existed, that petitioners do not connect with such deed; (c) there is no evidence that John A. Veatch, at the time he purchased the land, had notice of the purported deed from Felder to Daniel, or that he was not a *bona fide* purchaser without notice of such purported deed. (Houston Oil Co. v. Kimball, *supra*.)

They agree that the burden was on them to bring evidence to show these facts. We submit that there is not a hint in the record that shows or tends to show that Veatch was not a *bona fide* purchaser for value, but, on the contrary, every circumstance shows that he purchased this land in good faith from Felder, without any knowledge that Felder had ever conveyed it away. To sustain their specification, petitioners again here call attention to the repeated assertion of long claim on their

part, and non-claim on ours, and they ring the changes upon this in every conceivable way. This we have answered elsewhere.

The deed from Felder to Veatch recites a valuable consideration paid. Veatch showed that he had confidence in his title to the land, and gave not the slightest indication by his acts that he knew of or had ever heard of a superior outstanding title in William A. Daniel, because on March 15th, 1841, less than two years after he acquired his title from Felder, he conveyed the land to James Morgan, and gave a covenant of general warranty of the title.

We repeat again that there is not a scintilla of evidence in the record which shows or tends to show notice to Veatch of the Felder deed to Daniel, if such existed.

Petitioners have cited at some length in support of their specification the case of *Holland v. Nance*, 102 Tex., 177. We most earnestly submit that this case does not sustain petitioners in their position. If the burden was on the Veatch title to overcome the Daniel claim upon that issue, the proof is furnished by Daniel's non-claim and the active claim by Veatch and those holding under him. This is the extent of the holding in the case cited, and the principles announced sustain our position.

We deem it unnecessary to consume time with a further discussion of this question.

VII.

SEVENTH POINT.

(Relating to the question as to whether the purported deed from Felder to Daniel was recorded in Liberty County before it was filed and recorded in Menard County, so as to give constructive notice.)

Petitioners, by their sixth and seventh specifications of error, found on pages 15 and 16 of their brief, contend that the evidence was sufficient to submit to the jury the issue whether the purported deed from Felder to Daniel was recorded in Liberty County before the execution of the deed from Felder to Veatch, or that the court from the evidence should have presumed that it was so recorded. Our answer to this is: (1) There was no evidence that the purported deed from Felder to Daniel was ever recorded in Liberty County, but since the purported copy of such deed in the invalid Menard records contained no file mark by the clerk of Liberty County of its record in Liberty County, it was thereby conclusively shown that such deed was never recorded there. (2) If it be conceded that the purported deed from Felder to Daniel was genuine, and was recorded in Liberty County before Veatch purchased from Felder, such record of the deed would not have been constructive notice to Veatch, because the deed purports to have been acknowledged before William Myers, a notary public, and under the law in force at the time, a notary public had no authority to authenticate a deed; therefore the deed was not legally admitted to record so as to give constructive notice.

We assert that the record shows that the purported deed from Felder to Daniel was *not* recorded in Liberty County. To have charged respondents or those under whom they claim with notice by reason of the record of the deed, such record must have been made in Liberty County prior to June 18th, 1839, the date of the deed from Felder to Veatch.

If the deed had been, before that time, recorded in Liberty County, the certificate of such record by the proper

officer of Liberty County would have appeared on the deed, and such certificate would have been on the record found in Menard County. An inspection of the Felder to Veatch deed shows that when it was recorded in Menard County in 1841, its prior record in Liberty County in 1839 appeared as a part of the record of the deed. (R., 69.) This, then, shows conclusively that the deed was never recorded in Liberty County, and there was therefore no issue as to that to be submitted to the jury or to be presumed.

But again, there is another insuperable obstacle in the way of petitioners in charging respondents and those in their chain of title with such notice of this purported deed from Felder to Daniel:

(a) The record of a deed is only important as imparting constructive notice to subsequent purchasers, etc. Such registration, in order to give constructive notice, must be of an instrument authorized by law to be admitted to record.

“Without proper acknowledgment of the execution of the deed, its registration would not constitute notice.”

So held in *Hill v. Taylor*, 77 Tex., 295.

“To be a valid record, the instrument must have been properly proved for record before some officer authorized by law to take acknowledgments, and properly certified by such officer.”

So held in *Revier v. Wilkins*, 72 S. W. (Tex.), 608.

Many other cases to the same effect could be cited, but we deem it unnecessary, because the proposition of law asserted by us is too well settled to need discussion, and we assume will not be disputed.

(b) The purported deed from Felder to Daniel purports to have been acknowledged before Wm. Myers, styling himself as a notary public, and in that capacity he authenticates the instrument.

(a) *If it be conceded that the deed was executed by Felder to Daniel, as claimed;*

(b) *If it be conceded that Wm. Myers was a notary public, and as such authenticated the deed;*

(c) *If it be conceded that such instrument was spread upon the records of Liberty County;*

Still such registration did not give any notice of such instrument, because such record was improper and invalid, as, at that date (1839), a notary public was not authorized to take the acknowledgments of deeds for record.

Act of January 19th, 1839, in force at the time of the purported acknowledgment of the deed in question, is as follows:

“It shall be the duty of the clerk of the County Courts to record all deeds, conveyances, mortgages and other liens, affecting the titles to land and immovable property situated within the same, which shall be presented to them for record; provided, one of the subscribing witnesses shall swear to the signature of the signor, or he himself shall acknowledge the same; which proof or acknowledgment shall be made before some County Court or Chief Justice of the same, or before the clerk in whose office such instrument is proposed to be recorded, a certificate of which shall be made upon such instrument by the proper officer, and become a part of the record. And all laws contrary to or conflicting with this Act be, and the same are hereby repealed, so far as they conflict with, or are contrary to the same.”

See Paschal's Dig. of Laws of Texas, Art. 4974, or Hartley's Dig., Art. 2760.

By the Act of Feb. 5th, 1840, which took effect 16th of March, 1840, for the first time a notary public was authorized to take proof or acknowledgments of deeds. This Act is as follows:

"The clerks of the several County Courts of the Republic, and their deputies, shall be and they are hereby authorized and required to admit to record at any time, in the form required by this Act, any conveyance, either on the acknowledgment of the party or parties, or the proof on oath, of such acknowledgment by the legal number of witnesses thereto made, in the offices of the respective clerks; or upon the certificates of some District Judge, or Chief Justice, or *notary public* of a county, with the seal of his office thereunto annexed, that such acknowledgment was made, or the execution of the instrument proven as required above; and any conveyance so recorded shall have the same legal validity in all respects as if it were proven in open court." (*Italics ours.*)

See Paschal's Dig. of Laws of Texas, Art. 4975, or Hartley's Dig., Art. 2768.

If any decision were necessary to show the correctness of our position under so plain a statute as that of 19th January, 1839, quoted above, it is afforded by the case of *McCelvey v. Cryer*, 28 S. W. (Tex.), 691.

Notwithstanding the fact that we have urged the above proposition with all the force and emphasis that we could command upon every trial of the case, and in every brief and argument that we have filed in any court into which the case has gone, and that every court has sustained our position, the plaintiffs in error still assert in every brief that they file, and in the last one filed in this court, that—

“It cannot be disputed (and we take it will not be) that if the deed from Felder to Daniels was presented to the clerk of the County Court of Liberty County for record prior to the execution of the deed from Felder to Veatch (June 18, 1839), the title of the plaintiffs in error must prevail.”

We now again assert that we deny the statement of the plaintiffs in error, and do dispute most emphatically that that registration of the Daniel deed in Liberty County, even though before the deed to Veatch was executed, would have aided it in any way, or would have given any notice whatever of such deed, because, as we have seen, such registration was unauthorized, inasmuch as the deed was acknowledged before a notary public, not then authorized to take an acknowledgment, and the issue as to whether the instrument in question was spread upon the records of Liberty County was wholly immaterial. Counsel for plaintiffs in error have persistently refused to notice this position of ours, and we now again challenge them to dispute its correctness.

Therefore, the destruction of the records of Liberty County, which is conceded, is of no importance, and in no way affects the result in this case, notwithstanding the assertion made in the brief of counsel for plaintiffs in error (p. 2) that “much of the controversy in this case arises by reason of the destruction of such records.”

VIII.

EIGHTH POINT.

(In answer to plaintiffs in errors' contention that the evidence raised the issue of title in them under the ten years statute of limitation, we submit that:)

The testimony offered as to the acquisition of title to

the land in controversy by adverse possession was insufficient to justify a finding by the jury in favor of the defendants for the ten years statutory period of limitation, because it must be conceded that the uncontradicted evidence shows that at no time was adverse possession held for any consecutive period of ten years of any part of this land by anyone holding under the defendants, plaintiffs in error here.

Statement.

The Gulf, Beaumont & Kansas City R'y Co., as tenant of the Texas Pine Land Association, predecessor of the defendants, which began about January 1st, 1894 (R., pages 236-237 and 239), and terminated about 1900, when the G., B. & K. C. R'y Co. sold out to the Santa Fe. (R., pages 255 and 467.) The Texas Pine Land Association conveyed this land to the defendant, Houston Oil Company, on July 31, 1901 (R., p. 391), and there can be no pretense of evidence that anyone, as tenant or otherwise, for the Houston Oil Company, ever held said land prior to October 16, 1902, when the Texas Builders Supply Company began its operations. (R., p. 282.) During this period from July 31, 1901, when the Houston Oil Co. acquired their claim to the land, to October 16, 1902, a period of more than a year, there is no evidence that the Houston Oil Co. took any sand from the pit on the land, or made any other use of the land, either by agents or tenants. There is no pretense that the Houston Oil Co., during this fourteen months, gave anyone the right or permission to take sand from the pit, or otherwise use the land. There is no evidence that anyone claiming permission from the Houston Oil Company took sand from the pit, or otherwise used the land. So, if it be conceded

that the G. B. & K. C. R'y Co. had permission to take sand from the sand pit from the Texas Pine Land Association, and did take it up to the 31st day of July, 1901, when the Texas Pine Land Association conveyed the land to the Houston Oil Company, the ten years statute of limitation would not be completed up to this time, because the railroad never reached the sand pit and begun taking sand until 1894.

John H. Kirby, who was representing the G. B. & K. C. R'y Co., made the contract with the Texas Pine Land Association. His evidence is as follows:

"Q. Was that contract in writing?

"A. No, sir, I don't think there was any contract in writing. We had an understanding with the Texas Pine Land Association through Mr. Nelson, their auditor, and one of the trustees, who lived in Boston, and who came to Texas once a year, and sometimes oftener.

"Q. The understanding was with Mr. Nelson?

"A. Yes, sir.

"Q. Who had the understanding?

"A. I did, on behalf of the railroad company; I represented both concerns, and could not contract with myself.

"Q. There was an agreement with Mr. Nelson when he came down?

"A. Yes, sir, and there were probably letters at the time; I don't recollect, but no written contract.

"Q. Was the contract evidenced in writing, or verbal?

"A. My recollection is that it was a verbal understanding about the price, and also the rights of the railroad company while operating the sand pit, that is, while taking sand from the lease." (R., p. 257.)

Mr. Kirby testified that the G. B. & K. C. R'y Co. ceased to take sand in August, 1901. (R., p. 258.)

"Q. Who loaded the cars?

"A. Well, they had different methods at different times. Sometimes Mr. Fortenberry, with the employes, loaded the cars, and sometimes the G. B. & K. C. section hands loaded them, and sometimes the railroad had a steam shovel to load them.

"Q. That commenced in 1893, how long did it continue?

"A. I think that relation ceased in August, 1901."

Mr. Kirby further testified that they sold the G. B. & K. C. R'y Co. to the Santa Fe in 1900. (R., p. 225.)

"Q. Mr. Kirby, did you have any connection with the G. B. & K. C. Railroad?

"A. Yes, sir. I was Vice-President and general manager.

"Q. For what length of time; during what years?

"A. From the time it was chartered, in 1893, until 1900.

"Q. What became of that railroad?

"A. We sold the stock to the Santa Fe, and it was afterwards merged into the Santa Fe system. (R., p. 255.)

"Q. Where were you in 1899?

"A. The same condition.

"Q. Boston, Beaumont and Houston?

"A. Yes, sir.

"Q. And in 1900?

"A. The same condition up to July, when I sold the railroad to the Santa Fe." (R., p. 272.)

Mr. Wilson, a witness for the defendant, who was assistant general manager of the G. B. & K. C. R'y Co., testified that the Santa Fe bought it in 1900. (R., p. 457.)

"Q. The Santa Fe bought in 1900?

"A. Yes, sir.

"Q. You left here in 1901?

"A. Yes, sir.

"Q. How do you know the Santa Fe bought in July, 1900?

"A. Mr. Kirby said so. I know I drew my pay from the Santa Fe railroad for eleven months."

Mr. Kirby testified that the Texas Pine Land Association conveyed the sand pit to the Houston Oil Company when they conveyed the land, and never undertook to retain the sand pit for the benefit of the Santa Fe railroad. He says that after the sale by the Texas Pine Land Association to the Houston Oil Company the Santa Fe railroad tried to make such a contention. (R., p. 287.)

"Q. State the substance of the conversation.

"A. I remember the facts; I don't remember the conversation. When the Santa Fe built its road from Conroe or Cleveland into Silsbee, I donated the right-of-way through my land, and when they got into Silsbee, in 1901, just prior to the sale, they wanted to get sand from Fletcher with which to ballast the track from Silsbee west, and Mr. Ripley said he did not think they ought to pay for it; that they were building up the country and benefiting the land, etc., and I told him if he thought that way, I would try to get the consent of the Texas Pine Land Association about tonnage, and taking the sand for ballast. I don't know how much of that sand the Santa Fe used. I did speak to those interested. I did not think the Houston Oil Co. was under any obligation to donate it unless they wanted to. The contention did not arise until the Houston Oil Co. acquired the property.

"Q. Did you not make this statement to them: That you had intended, according to your promise to Mr. Ripley, to transfer the exclusive right to the Santa Fe of that sand pit, and had forgotten it when you came to make the transfer from the Texas Pine Land Association to the Houston Oil Co?

"A. No, sir; I would not have stated an untruth.

"Q. You did not make an agreement like that?
 "A. No, sir, I did not." (R., pp. 287-288.)

There is no evidence that the Houston Oil Company, after its purchase from the Texas Pine Land Association, July 31, 1901, ever gave the Santa Fe Railroad Co., Pitman, Sim Collins, or anybody else, the right to take sand from the sand pit; and if either of these parties at any time after July 31, 1901, took sand from, or otherwise used the land, they did so as strangers and trespassers, without any contract or right from the Houston Oil Co., as there is no evidence in the record that anyone had a right to take sand until October 16, 1902, when the Houston Oil Company entered into the contract with the Texas Builders Supply Company.

Authorities.

It is well settled in Texas that where one tenant moved off of land, and a stranger, without any contract or right from the claimant of the land, moves on it and takes possession, though only for a short period, that this is sufficient to break the continuity of the possession, though immediately after such stranger moves away the claimant puts another tenant in possession. This was so decided in the case of *Warren v. Frederick*, 76 Tex., 647. The facts of that case in this particular were as follows:

"After Stutsman left, one Hall moved on the land and was in possession of it a few weeks. If he held under or for anybody the record does not disclose it. He did not claim the land. Shortly after Hall left (in December, 1871), the mother of the plaintiff moved on the land."

On this point of break in the possession, the court says:

“We think the evidence that in the fall of 1871 the tenant in possession left the land unoccupied, and that a stranger moved onto it and was in possession of it for a period of time, made the charge given by the court on the subject of breaks in the possession proper.”

The charge complained of was as follows:

“If the jury find from the evidence that one or more persons had possession of this land other than Cassells and those who were there by his permission and authority, between the time Cassells took possession and the fall of 1871, then the possession of Cassells and his tenant, and also the possession of Cassells’ vendor, can avail the plaintiff nothing, and he cannot connect it with the possession of himself and his immediate vendor.”

It is elementary that there must be privity between successive occupants, in order that the possession may be tacked together.

1 Cyc., 1001, states the rule as follows:

“Nevertheless, in order that such possession may be tacked, it is essential that privity, either of contract, estate, or blood, should exist between the successive occupants. Different entries at different times by different persons, between whom there is no privity or connected claim of rightful holding, are but a succession of trespasses, and neither can furnish any support to the other. Each possession is a distinct and independent wrong, for which an action may be maintained.

“The reason why privity is necessary is that in its absence a new and distinct disseizin is made by each disseizin. As soon as the former adverse holder quits possession, the true owner, in virtue of his legal title, is again instantly seized or possessed of the premises by operation of law, and thereby the con-

tinuity of the possession between the adverse claimants is broken."

Furthermore, it is too plain for argument that when the Texas Pine Land Association conveyed to the Houston Oil Company, the verbal contract to take sand at will from the pit between the Texas Pine Land Association and the G. B. & K. C. R'y Co. terminated, and the Santa Fe R'y Company's rights under the contract, as the successor of the G. B. & K. C. R'y Co., were thereby ended. (24 Cyc., p. 1340.)

The case of *Houston Oil Co. v. Griffin*, 166 S. W., p. 904, states the rule as follows:

"The fact that the father, Ivy Griffin, prior to the sale of the land by the Village Mills Co., held possession as tenant at will of said company, would not, after the abandonment of the field by him, he having in the meantime purchased a portion of the survey from the vendees of the Village Mills Company, affect the subsequent adverse possession of appellee. There is nothing in the evidence tending to show that Ivy Griffin ever agreed to hold the land for the vendees of the Village Mills Co., or that they ever supposed that he was occupying any portion of the land as their tenant."

Of course, there could not be ten years' possession under the Texas Builders Supply Company, because the contract was entered into on the 16th day of October, 1902, when it began taking sand from the pit, and this suit was filed against defendants to recover the land on the 7th day of June, 1911. (R., p. 2.)

Second Proposition.

The possession, use and enjoyment of the land was not of that visible open and hostile character that would ap-

prise the true owners that their land was being adversely claimed and held. This because the possession and use, for a large part of the time, was practically confined to the railway right-of-way, and for very much of the time did not extend beyond the ground, which, under the Texas statute, could be claimed and held as a right-of-way, and at no time covered anything more than a very small area of ground consisting of a portion of a deposit or hill of sand situated at Fletcher on the line of the railway. That such possession and use did not apprise the true owners that their tract of 2578 acres was being adversely claimed.

Statement.

As to the character of the possession under which the defendants seek to avail themselves of limitation, it appears that under some sort of agreement between the Texas Pine Land Association, and G. B. & K. C. R'y Co., the latter took sand, largely, if not exclusively, from its right-of-way on the land, for use in the construction or in the repair of its roadbed, occasionally for private use, in order to increase the freight receipts of the railway. (R., 256, 257, *et seq.*) This taking of sand by the railway was confined very largely to the right-of-way of 100 feet, and was never extended beyond a space to which it was entitled under the statute if it so desired it.

That statute is as follows (Rev. Stat., Art. 6484):

“Such corporations shall have the right to lay out its road not exceeding *two hundred feet in width*, and to construct the same; and for the purpose of cuttings and embankments, to take as much more land as may be necessary for the proper construction and security of its railway, and to cut down any standing trees that may be in danger of falling upon or ob-

structing the railway, making compensation in the manner provided by law."

The witnesses Ward (R., pp. 699-701), Patillo (R., pp. 708-709), Scott (R., p. 720), Knupple (R., p. 723), and Joe Bumpstead (R., p. 733), all say that prior to 1902 very little, if any, sand had been taken by the railway outside of the 100-foot right-of-way, and admittedly none outside of a 200-foot right-of-way. Danziger, the representative of the Texas Builders Supply Co., who operated the sand pit after 1902, says that when they went there in 1902 the sand excavation did not extend more than 75 or 80 feet from the railway track, and may have been a little out of the 100-foot right-of-way. (R., p. 238.) There were no houses occupied by anyone for the defendants or their predecessor in title, and none there except the pump house, near the bank of the creek, on the railway right-of-way, and used alone for housing the pump to pump water into a railway tank on the right-of-way for railway purposes. This is shown by the testimony of the witnesses noted above.

Authorities.

In the case of *Bartine v. McElroy*, 123 S. W., 1174, 1176, the court says:

"It is contended by appellants that the possession of the land shown by the undisputed evidence is not of that visible, notorious, distinct and hostile character which is necessary to support a plea of title by limitation. We think this contention should be sustained. As before said, the only possession of the land by appellees was of a narrow triangular strip, only a fraction of an acre, inclosed with other land on the adjoining tract owned and cultivated by appellees, and we think it clear that the possession of this strip

inclosed in this way was not sufficient to put appellants, or those under whom they claim, upon notice that appellees were claiming the 326½ acres of land owned by appellants. The land so held by appellees was not a substantial part of appellants' tract, and, if we gave full effect to the rule which charges the owner with knowledge of the location of the boundaries of his land, it cannot be said that appellants could reasonably have presumed, had they gone upon their land and seen this encroachment by appellees, that the appellees intended thereby to claim all of the 326½ acres, or any part thereof, outside of their enclosure. It is well settled that an encroachment of this kind, which does not appropriate some substantial portion of the land sufficient in extent to give notice to the owner of an adverse claim to his land by the trespasser, will not support a plea of limitation," citing the following cases:

Bracken v. Jones, 63 Tex., 184.
 Tucker v. Smith, 68 Tex., 473.
 Downs v. Powell, 116 S. W., 873.
 Titel v. Garland, 99 Tex., 201.
 McAdams v. Weaver, 122 S. W., 619.

Third Proposition.

The possession, use and enjoyment claimed by defendants was through tenants who, by the terms of the contract under which they held, were RESTRICTED to a defined area of only a few acres in extent. Therefore, there was no adverse possession by such holding of the whole tract of 2578 acres, and there being no pleading for or claim to the restricted area by the defendants, even if limitation applied to that, then limitation failed as to any.

Statement.

The possession of the Texas Builders Supply Company,

under whom limitation is also claimed, was by the terms of the contract under which they entered the land, October 16, 1902, restricted to "*a certain sand pit at the station of Fletcher, in Hardin County, Texas, on the line of the Gulf, Beaumont & Kansas City Railway Co., said pit being known as Pit 'F.'*" It will be noted that the contract does not even mention the Felder Survey of land, but identifies the property to be held and used as a sand pit, known as Pit "F" at Fletcher Station. On the former appeal of this case the court held that inasmuch as it did not appear but that Pit "F" might cover the whole survey of land, it was therefore a question of fact as to what was the extent of the possession under this contract. On this trial we have shown what Pit "F" was, and its extent. That it was a well recognized deposit or hill of sand, situated on the north side of Village Creek and west of the railway track, and consisted of about six or eight acres. See testimony of Ward (R., 697), Patillo (R., p. 710), Knuppel (R., pp. 724-725), Bumpstead (R., p. 732), Danziger (R., p. 250), and perhaps others. The letter from A. W. Standing, general manager of the defendant Houston Oil Co., of date June 7, 1911, to Brown Supply Co., shows that the defendant located the sand pit "F" west of the railway track, as it was located by the other witnesses (R., pp. 747-749), and established beyond question that Pit "F" was of a defined area, recognized by the parties to the contract under which the Builders Supply Company held.

Authorities.

Elliott v. Pearl, 10 Peters, 412.

"But if the tenant is restricted by metes and

bounds to a part only of the land, the landlord's possession is likewise limited."

Houston Oil Company v. Kimball, 114 S. W., p. 667; affirmed by the Supreme Court in same case, 103 Tex., 94; Read v. Allen, 63 Tex., 155, 158.

See, also, Wier Lumber Co. v. Conn, 156 S. W., 276, which overrules Haynes v. R. R. Co., in 111 S. W., 429 (cited as an authority by defendants in their brief), in accordance with ruling in Houston Oil Co. v. Kimball, cited above. Many other cases to the same effect could be cited. If further discussion is requested, we beg to refer to our brief in Circuit Court of Appeals, pages 72 *et seq.*

Fourth Proposition.

The possession of defendants was not exclusive, but held in common with others, because portions of this same tract of land was held by others, not claiming under the defendants or their predecessors, but independently of them, and in no way connected with them. And defendants having failed to show any exclusive adverse possession of any defined part of said land, limitation failed as to any.

Statement.

The uncontradicted evidence shows that portions of the tract of land involved in this suit during all the time that defendants claim to have had possession of any part of it were held by several persons wholly independent of the defendants. This is shown by the testimony of the witnesses Patillo (R., p. 711), Bumpstead (R., pp. 734-735), and others.

Authorities.

Wiley v. Bargman, 90 S. W., 1116.

In this case it is held that even though Refugio Navarette and Avaristo Avillar had been the tenants of Wiley,

"for the full period of 10 years, as claimed by him, the undisputed evidence showing that their possession of said lot was not exclusive, but that it was shared in common with Felipe Chacon, who erected buildings and pens upon said lot, and used the same to a greater extent than did the said Avaristo Avillar or the said Refugio Navarette themselves, and he, the said Chacon, never at any time recognized, or was the tenant of Wiley, but, on the contrary, went into possession as the tenant of Jesus Serna, and remained his tenant, thereafter attorning to Mrs. Hills and paying her rent, but never to Wiley, and holding adversely to any claim that Wiley might have during the entire time he occupied, jointly with said other parties, the property. There is, therefore, no exclusive possession shown on the part of the said Refugio Navarette or the said Avaristo Avillar which would enable their landlord to claim by limitation, through them, the said entire lot No. 10. And, there being no evidence before the court to show the confines of the property actually occupied by them with their house, the intervener (Wiley) cannot recover upon his claim of title of 10 years. But, should it be conceded that the intervener had and held adverse possession for a period of 10 years through the said Avaristo Avillar and the said Refugio Navarette of a portion of said lot No. 10, there is no evidence before the court to show what portion of said lot, if any, was so held by occupancy adversely."

Richards v. Smith et al., 67 Tex., 612, holds that:

"To give title by limitation there must be an adverse claim, and *exclusive occupation or possession* of the thing for the length of time and under the circumstances prescribed by the statute."

Fifth Proposition.

The testimony offered as to the acquisition of title to the land in controversy by adverse possession was insufficient to justify a finding by the jury in favor of the defendants for either of the statutory periods of limitation relied on, because (a) the testimony of the defendants showed breaks in the possession to the extent that no one possession, if adverse, was continuous for a sufficient period of time to satisfy either one of the statutory periods of limitation relied upon by the defendants, and there was no evidence showing that such breaks were of so short duration as not to defeat the continuity of possession, and since it is incumbent upon parties relying upon limitation to show the facts from which the conclusion of continuity may be deduced affirmatively, the court could not assume that such breaks were of so short duration as not to defeat limitation; (b) because the testimony was too weak, indefinite and uncertain to justify the court in submitting to the jury either one of the statutory periods of limitation relied upon by the defendants, for the reason that if the jury had so found, it would have been the duty of the court to set aside their verdict.

Statement.

It was claimed by defendants that the use and enjoyment of the land consisted in taking sand from it.

E. K. Ward (Rec., pp. 699-701), Tom Patillo (Rec., pp. 709-715-716), N. B. Scott (Rec., p. 720), W. H. Knupple (Rec., pp. 723 to 728), Joe Bumpstead (Rec., p. 733), all testify that the taking sand was only occasional and periodical, and that there were many times when no sand was being taken out.

These witnesses also testify that the only house on the land other than the pump house on the railway right-of-way was the house built by Carroll in 1901.

W. W. Wilson, a witness for the defendants, testified on the former trial that there were several times during the time of his connection with the railway, from 1895 to 1901, when there would be periods of months at a time when no sand was being taken. (Rec., pp. 432-452-457.)

On this trial he attempts to qualify this statement, but finally on cross-examination breaks down and admits that during the time of his connection with the railway there were at least two periods when at least for as long a period as six months at a time nothing was being done at the sand pit. (See question and answer, at bottom of page 456 and top of 457.)

Authorities.

In the case of *Allen v. Clearman*, 128 S. W., pp. 1140-1143, it is held:

"The occasional sale of shell from a shell bank on the lots, as shown by the evidence, was not such adverse possession as would support limitation." *Stegal v. Huff*, 54 Tex., 193; *Cook v. Lister*, 38 S. W., 380.

It is elementary that the possession must be continuous in order to perfect title by adverse possession. The rule is thus stated in 1 Cyc., p. 1000:

"In order to perfect title by adverse possession, such possession must be continuous for the whole period prescribed by the statute of limitations. Any break or interruption of the continuity of the possession will be fatal to the claim of the party setting up title by adverse possession. Occasional trespasses

or acts of ownership do not constitute such continuous possession as will ripen into a title by adverse possession, although extending over the statutory period."

In *Dunn v. Taylor*, 102 Tex., 85, it is said:

"Admitting that breaks occurred, they are not in a position to ask the courts to assume that such breaks were of so short duration as not to defeat the continuity of the possession. It was incumbent on them to show the facts from which the conclusion of continuity may be deduced affirmatively. But we think the evidence affirmatively indicates, at least, that there were intervals between the possession of Thornton and of Bresnall and Blocker and between those of the latter and of Cavender, which were too great to be disregarded, as the reasonable time allowed by the law for changes of occupants. No decision of this court has ever held to be immaterial such lapses of possession as this evidence indicates. It was improper for the court to submit, as it did, to the jury the question as to reasonableness of the time. There was no evidence from which the jury could properly determine that only reasonable intervals occurred when they could not possibly know how long those intervals were. Whether it is proper in any case, where the length of the intervals is shown, to submit such an inquiry to a jury is not the question. It certainly is improper to submit a question which cannot be decided upon the evidence adduced. We cannot admit the right of the courts to require only nine or nine and a half years of continuous possession, when the law requires ten, and this would be the effect of overlooking gaps of six months or a year between tenancies."

See, also, *Overand v. Menezzer*, 83 Tex., 122, which is to the same effect.

"The burden of proving adverse possession rests upon the party alleging it.

"The doctrine of adverse possession is to be construed strictly, and such possession cannot be made out by inference, but only by clear and positive proof." [1 Am. & Eng. Encyc. of Law (2nd Ed.), p. 887.]

"It (the adverse possession) is not made out by inference, but by clear and positive proof. Every presumption is in favor of possession in subordination to the title of the true owner." (Abbott's Trial Ev., 2nd ed., Sec., 37, p. 905.)

"Both limitation and estoppel are pleas requiring much clearness of proof." (Tucker v. Smith, 68 Tex., 481.)

IX.

NINTH POINT.

Five Years Limitation.

The issue as to title in the defendants by five years adverse possession was submitted to the jury by the trial court as a question of fact, and, they, under appropriate instructions from the court, which were not excepted to by defendants, found for the plaintiffs and interveners, under testimony which overwhelmingly sustains and justifies such finding. We most respectfully insist that the facts disclosed by this record authorized fully a peremptory instruction from the court directing a verdict for the plaintiffs and interveners upon this issue, and we believe that such an instruction ought to have been given. Certainly defendants have no right to complain.

Upon this issue the judgment is sustained upon the following counter-proposition or points to defendants' proposition No. 8:

First Proposition.

The testimony in the case abundantly justified the

jury's verdict, because it overwhelmingly showed that the use and occupation of the land by the G. B. & K. C. R'y Co. was not continuous and uninterrupted for a consecutive period of five years.

Second Proposition.

The verdict of the jury was correct, because the uncontradicted testimony showed that possession of the Texas Builders Supply Company by occupancy of houses and removal of sand was under a contract by the terms of which it was restricted to sand pit "F." And sand pit "F" was shown by the uncontradicted evidence to be a confined area of a few acres in extent, and there being no pleading for or claim to the restricted area by the defendants, limitation failed as to any part of the land.

Third Proposition.

The verdict of the jury was correct, because the possession of the Texas Builders Supply Company of the few acres known as sand pit "F," and taking sand from such small area was not such use of the land as would constitute adverse possession to the entire tract of 2578 acres of land.

Statement.

The evidence shows that the operations of the Builders Supply Company covered a small area. The witness L. F. Daniel, an engineer and surveyor, says that he measured the excavations made by the Texas Builders Supply Company as pointed out to him by Mr. Danziger, and one covered 94/100 of an acre, and another covered 14/100 of an acre. (Rec., pp. 738-739.) Evidence offered by defendants tended to show that these were larger. But

even as to that, the area was small. Only a few acres in extent.

The case of Griffin v. Houston Oil Company, 149 S. W., pp. 568-569, was one in which Griffin claimed title by ten years' possession to 160 acres of land. The evidence showed that he cultivated one acre on the tract for more than five years, and then cultivated $2\frac{1}{2}$ acres in another place on the same tract, so as to complete the ten years. The trial court held this possession as matter of law failed to give a limitation title. The appellate court decided that "it cannot be held as a matter of law that the enclosure and cultivation of a field of $2\frac{1}{2}$ acres or of 1 acre is not sufficient possession and use of land to put the owner upon notice that the person cultivating such field is claiming the tract of land upon which it is situated, or a larger portion of said tract than the amount actually enclosed and cultivated. *The sufficiency of such possession as notice is a question of fact to be submitted to the jury under instructions.*" Houston Oil Company v. Griffin, 166 S. W., 902-904 (second appeal of this case), same proposition re-affirmed.

In this case that question was, in accordance with the decision cited, as well as in accordance with the former opinion of this court in the instant case, submitted to the jury (Rec., pp. 797-800), under instructions which are not complained of, and the jury under evidence which fully authorized it found for the plaintiffs and interveners. This possession, then, even if every other necessary condition existed, was ineffectual as a basis of limitation.

TENTH POINT.**Three Years Limitation.**

(In reply to the contentions of plaintiffs in error that the court should have submitted to the jury the issue of three years limitation, we submit that, in addition to the fact that the evidence showed that the possession relied on was, at all times, restricted to the right-of-way of the railway company and sand pit F, and was not continuous for any period of three, five or ten years, which we have discussed above, plaintiffs in error could not prescribe under the three years statute of limitation, because the deed from Chas. Felder to William A. Daniel, under the statute of 1836, by reason of not being recorded at the time Veatch took his deed from Felder, was extinguished—"did not take effect"—as against the deed from Felder to Veatch under which defendants in error claim.)

It seems to us quite plain that as the elder deed, under the Registry Act, was made void as against the junior deed (see 24 Am. & Eng Ency. of Law, 2nd Ed., 117), it would be a contradiction in terms to say that henceforth holders under the elder deed had, as against holders under the junior deed, the title or color of title essential for three years limitation. (Sayles' Tex. Civil Stats., Arts. 3340-3341.) Certainly, after the junior deed, the elder grantee had no power to convey, resulting from his "want of title, either legal or equitable, to pass any title whatever to another," which is one of the tests adopted. (See *League v. Rogan*, 59 Tex., 430, 431.) Again, after the junior deed, the "right, interest or estate" of the original grantee, Chas. A. Felder, plainly would not pass by a conveyance from or under the elder grantee, which

has been held a conclusive test against the three years statute. (See *Grigsby v. May*, 84 Tex., 252, 254.)

Possession for three years under one whose legal title has been extinguished will not support limitation. *Burton v. Carroll*, 96 Tex., 320; *Houston Oil Co. v. Kimball*, 103 Tex., 94; *Smith v. Burch*, 73 S. W. R., 559.

Conclusion.

We have pointed out in the foregoing brief the following undeniable facts:

First: Assuming that there were two complete chains of title to this land, one emanating through the deed from Felder to Veatch, and the other from Felder to Daniel, the Veatch title, under the settled law of Texas and the undisputed facts in this record, is the only title to the land.

Second: That as a matter of fact the plaintiffs in error have produced no evidence of a conveyance to Wm. A. Daniel, and in no manner connect with the putative deed from Charles Felder to William A. Daniel. On the contrary, the record affirmatively shows that their claim rests upon a quit-claim deed made in 1855 by William Daniels, affirmatively proved not to be identical with William A. Daniel, whereby for a consideration of seven-tenths of a cent per acre he quit-claimed said land to T. J. Word, and expressed in the deed such a disclaimer of title to the land that he put this clause in his warranty: "Against every person whomsoever claiming or to claim the same or any part thereof through or under me, my heirs or assigns, but against no other claim of any kind whatsoever."

At the expense of brevity, we have undertaken to an-

swer every contention made by the plaintiffs in error. We submit that there is no merit in the specifications presented to this Honorable Court, and most respectfully pray that the judgment of the court below be in all things affirmed.

Respectfully submitted,

WILLIAM D. GORDON,

Attorney for Defendants in Error.

HARRISON M. WHITAKER,

EUGENE E. EASTERLING,

THOMAS J. BATEN,

Of Counsel.

No. [REDACTED]

76

APR 3 1917

Office Supreme Court, U.

FILED

JAMES D. MAHER

CLERK

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS
ET AL.,

Plaintiffs in Error,

VS.

CORNELIA G. GOODRICH ET AL.,

Defendants in Error.

BRIEF FOR PLAINTIFFS IN ERROR

— By —

WILLIAM L. MARBURY,

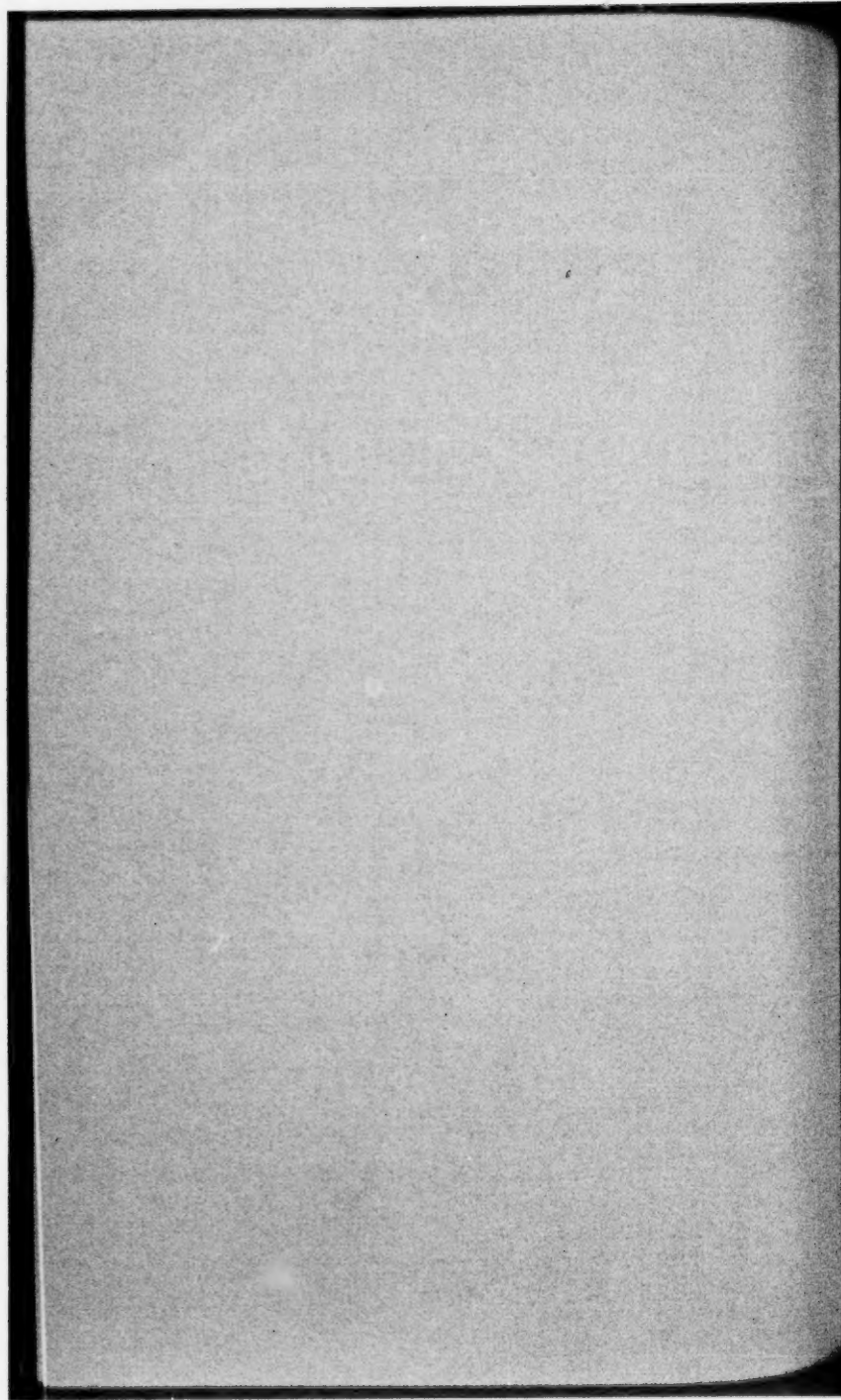
OSWALD S. PARKER,

THOMAS M. KENNERLY,

*Attorneys for Plaintiffs in Error, Houston
Oil Company of Texas, Kirby Lumber
Company, and Maryland Trust Com-
pany.*

MARBURY, GOSNELL & WILLIAMS,
HEAD, DILLARD, SMITH, MAXEY & HEAD,
PARKER & KENNERLY,

Of Counsel.



SUBJECT INDEX

	PAGES
Statement of the case	1- 4
Specification complaining of refusal of trial judge to submit issue of execution of deed from Fel- der to Daniel, under which plaintiffs in error claim, to the jury	5
Brief of argument on said question	25
Specification complaining of refusal of trial judge to admit in evidence certified copy of deed from Felder to Daniel, under which plaintiffs in error claim	6
Brief of argument on said question	59
Specification complaining of refusal of trial judge to submit to the jury the issue of whether or not deed under which defendants in error claim, from Felder to Veatch, was in fact exe- cuted	11
Brief of argument on said question	70
Specification complaining of refusal of trial judge to submit to the jury the question of whether Veatch, the vendee under the junior deed, un- der which defendants in error claim, was a <i>bona fide</i> innocent purchaser for value with- out notice of senior deed, under which plaint- iffs in error claim	12
Brief of argument on said question	88
Specification complaining of refusal of trial judge to peremptorily instruct the jury that the facts show that said Veatch was not a <i>bona</i> <i>fide</i> innocent purchaser for value, and that he had notice of such senior deed	14
Brief of argument on said question	88

Specifications six and seven, complaining of refusal of trial judge to submit to the jury the issue of whether the senior deed from Felder to Daniel, under which plaintiffs in error claim, was presented for record in Liberty County prior to the execution of the junior deed, under which defendants in error claim, the records of Liberty County having been destroyed by fire	15, 16
Brief of argument on said questions	90
Brief of argument on presumptions that will be indulged in support of the active title asserted by plaintiffs in error on the question of the execution of the deed from Felder to Daniel, and presenting of same for record in Liberty County, and that Veatch was not a <i>bona fide</i> innocent purchaser for value, etc.	93
Specification of error of refusal of trial judge to submit to the jury the issue of the ten-year statute of limitation	17
Specification of error of refusal of trial judge to submit to the jury the issue of the three-year statute of limitation	18
Specification of error of refusal of trial judge to charge the jury that the possession of the Texas Builders' Supply Company was the possession of plaintiffs in error	20
Brief of argument on the three, five and ten-year statutes of limitation	97
Eleventh and twelfth specifications of error, on the subject of restitution of the premises and restoration of the <i>status quo</i> of premises	22, 23
Brief of argument on question of restitution and restoration of the <i>status quo</i> of premises	107
Appendix A, showing certificate from office of the Secretary of State on the question of whether William Myers, who took the acknowledgment of the deed from Felder to Daniel, was a notary public of Jasper County at the time	111

LIST OF AUTHORITIES CITED

	CITED ON PAGE
Act of 1836 (Section 40)	90, 92
Act of 1836 (Section 41)	90, 92
Act of Dec. 20, 1836 (Section 1)	
Act of June 12, 1837 (Acts of 1837, p. 273, Gam- mel's Laws of Texas, Vol. 1, p. 1333)	64
Act of Feb. 5, 1841 (Articles 5672, 5673, 5674, 5675, 5676, 5679, 5680, 5681, 5682)	97
Act of Feb. 5, 1841, Section 20 (Laws of 1841, p. 168, Gammel's Laws of Texas, Vol. 2, p. 632)	65
Act of 1846, p. 42 (Gammel's Laws of Texas, Vol. 2, p. 48)	34
Act of Feb. 9, 1860 (p. 75 of Act of 1860, Gammel's Laws of Texas, Vol. 4, p. 1437)	65
Act of 1907 (Article 3700)	66
Association v. Heady (50 S. W., 1079; 57 S. W., 583)	62
Arriola v. Newman (113 S. W., 157)	68
Arthur v. Ridge (89 Tex., 15)	96
Ashley v. Board of Supervisors (60 Fed., 55)	68
Bank v. Dandridge (12 Wheaton, 64)	62
Bledsoe v. Haney (122 S. W., 456)	68
Bledsoe v. Haney (139 S. W., 613)	68
Beaumont Pasture Co. v. Preston (65 Tex., 457)	68
Beaumont Pasture Co. v. Preston (65 Tex., 448)	84
Bamberger v. Schoolfield (160 U. S., 157)	80
Bamberger v. Schoolfield (160 U. S., 149; 40 Law. Ed., 374)	26
Belcher v. Fox (60 Tex., 527)	86
Brown v. Simpson (67 Tex., 231)	87
Baldwin v. Goldfrank (88 Tex., 257)	96
Bringhurst v. Texas Co. (87 S. W., 893)	96

Broom's Legal Maxims, p. 949	97
Bank of U. S. v. Bank of Washington (31 U. S., 8; 6 Peters 8; 8 Law. Ed., 299)	107
Bowles v. Brice (66 Tex., 724; 2 S. W., 729)	105
Collier v. Coutts (45 S. W., 485)	105
City of El Paso v. Ft. Dearborn (96 Tex., 496; 74 S. W., 21)	105
Craig v. Cartwright (65 Tex., 413)	105
Cunningham v. Frandtzen (26 Tex., 34)	105
Castle v. Duncan [2 Serg. & R. (Pa.) 57]	108
City & Sub. R'y v. Svedborg (194 U. S., 201; 48 Law. Ed., 935)	26
Crayton v. Hamilton (37 Tex., 269)	68
Cox v. Cock (59 Tex., 521)	83
Cannon v. Cannon (66 Tex., 682; 3 S. W., 38)	62
Deen v. Wills (21 Tex., 648)	62
Delk v. Railroad (220 U. S., 583)	79
Delk v. Railroad (220 U. S., 580; 55 Law. Ed., 590)	26
Ewing v. Burnet (11 Peters, 41)	98, 104
<i>Ex parte</i> Morris and Johnson (76 U. S., 605; 19 Law. Ed., 799)	107
<i>Ex parte</i> Kellogg (64 Cal., 343; 30 Pac., 1030)	109
Early Laws of Texas (Vol. 1, p. 73)	
Foster v. Kansas (112 U. S., 201)	109
Fletcher v. Fuller (120 U. S., 534)	95
Frugia v. Trueheart (106 S. W., 737)	96
Goodrich v. Houston Oil Co. (213 Fed., 136), (234 U. S., 759), (226 Fed., 435)	3
Gregg, Richard, v. Robert Forsyth (69 U. S., 56; 17 Law. Ed., 782)	107
Galpin v. Page (85 U. S., 350; 21 Law. Ed., 959)	107
G. C. & S. F. R'y Co. v. Ft. W. & N. O. R'y Co. (68 Tex., 98)	109
Gardner v. Railroad (150 U. S., 349; 37 Law. Ed., 1107)	26

	<i>v</i>
Gardner v. Railroad (150 U. S., 349)	81
Ganer v. Cotton (49 Tex., 101)	86
Garner v. Lasker (71 Tex., 431)	96
Hooks v. Colley (53 S. W., 56)	35
Hill v. Taylor (77 Tex., 295; 14 S. W., 366).....	69
Houston v. Blythe (60 Tex., 506)	88
Holland v. Nantz (102 Tex., 177; 114 S. W., 346)....	88
Hirsch v. Patton (108 S. W., 1016)	96
Hinchman v. Ripinsky (202 Fed., 625)	107
Haynes v. T. & N. O. R. R. (111 S. W., 427)	105
Horseley v. Moss (23 S. W., 1115)	106
<i>In re</i> McKenzie (180 U. S., 536)	108
Johnson v. Taylor (60 Tex., 360)	62
Keeley v. Sanders (99 U. S., 441)	62
Kinkaid v. Lee (119 S. W., 343)	68
Kimball v. Houston Oil Co. (100 Tex., 336; 99 S. W., 852)	90
Kellogg, <i>ex parte</i> (64 Cal., 343; 30 Pac., 1030)	109
Laws of 1838, p. 10 (Gammel's Laws of Texas, Vol. 1, p. 1840)	63
Laws of Texas (Gammel, Vol. 2, p. 538)	29
Laws of Texas (Gammel, Vol. 2, p. 529)	30
Laws of Texas (Gammel, Vol. 2, pp. 919-922)	32
Lang v. City of Bayonne (68 Atl., 90).....	69
Lincoln v. Powe ^r (151 U. S., 436).....	81
League v. Rogan (59 Tex., 427)	98, 104
Morris and Johnson, <i>ex parte</i> (76 U. S., 605; 19 Law. Ed., 799)	107
Merrimac River Sav. Bank v. Clay Center (219 U. S., 527)	108
McKenzie, <i>In re</i> (180 U. S., 536).....	108
McKissick v. Colquohon (18 Tex., 148)	62

Millwee v. Phelps (115 S. W., 891)	68
Merriman v. Blalock (121 S. W., 552)	68
McClevy v. Creyer (28 S. W., 691)	68
Maxson v. Jennings (48 S. W., 781)	96
Northwestern Fuel Co. v. Brock (139 U. S., 216; 25 Law. Ed., 151)	107
Parker v. Baines (65 Tex., 605)	98, 104
Puryear v. Friery (40 S. W., 446; writ of error re- fused by Supreme Court of Tex., 93 Tex., 693)	105
Peticolas v. Carpenter (53 Tex., 23)	107
Perry v. Tupper (71 N. Car., 385)	107
People's Cemetery Ass'n v. Oakland Cemetery Co. (60 S. W., 679)	109
Penn. R. R. Co. v. Nat'l Docks and N. J. R. R. Co. (54 N. J. Eq., 654; 35 Atl., 433)	109
Phoenix Mutual Life Ins. Co. v. Doster (106 U. S., 30)	25
Revised Statutes of Texas of 1879 (Art. 674)	34
Rev. Statutes of Texas of 1911 (Art. 3700)	82
Riley v. Township of Garfield (38 Pac., 561; 49 Pac., 85)	69
Railway v. Svedorg (194 U. S., 201)	81
Railway v. James (163 U. S., 485)	81
Railway v. James (163 U. S., 485; 41 L. Ed., 236)...	26
Robertson v. DuBose (76 Tex., 1)	83
Reynolds v. Harris (14 Cal., 67)	108
Read v. Allen (63 Tex., 154)	105
Rogers v. Frazier (108 S. W., 727)	106
Railway Co. v. Robinson (73 Tex., 277; 11 S. W., 327)	106
Robinson v. Alabama (67 Fed., 189)	107
Stafford v. King (30 Tex., 259)	98, 104
Stenard v. Brownlow [3 Munf. (Va.), 229]	108
San Antonio St. R'y Co. v. State (38 S. W., 54; 90 Tex., 521)	109

State, <i>ex rel.</i> Morse, v. District Court (29 Mon., 230; 76 Pac., 412)	109
State, <i>ex rel.</i> , v. Pittsburg (80 Kan., 710; 25 L. R. A., N. S., 226; 104 Pac., 847)	109
Stockton v. Montgomery (Dallam's Decisions, p. 473)	30
State v. Carroll (38 Conn., 449)	68
State Bank v. Frey (91 N. W., 239)	69
Storey v. Flannigan (57 Tex., 649)	83
Stooksbury v. Swann (85 Tex., 563; 22 S. W., 963)	87
Stooksbury v. Swann (34 S. W., 369; 73 Tex., 739)	88
Thompson v. Johnson (84 Tex., 548; 19 S. W., 784)	64, 65
Texas Mexican R. R. Co. v. Euribe (85 Tex., 386; 20 S. W., 153)	96
Toranses v. Melsing (106 Fed., 775)	109
Tignor v. Toney (35 S. W., 881)	106
Texas Land Co. v. Williams (51 Tex., 51)	105
United States v. Shipp (203 U. S., 563)	108
United States v. Chavez (175 U. S., 522)	95
Waters v. Spofford (58 Tex., 115)	68
Williams v. Conger (125 U. S., 397)	72
Williams v. Conger (49 Tex., 592; 49 Tex., 596)	86
White v. Van Horn (159 U. S., 3)	81
White v. Van Horn (159 U. S., 3; 40 Law. Ed., 55)	26
Willis v. Lewis (28 Tex., 186)	83
Warren v. Fredericks (76 Tex., 647; 13 S. W., 643)	85
West v. Houston Oil Company (102 S. W., 927)	86
Wilson v. North Carolina (169 U. S., 586)	109
Wartman v. Wartman, Taney 362, Fed. Cas. No. 17,210	109
Waggoner v. Snody (98 Tex., 512; 85 S. W., 1134)	106



IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1916

HOUSTON OIL COMPANY OF TEXAS
ET AL.,

Plaintiffs in Error,

VS.

CORNELIA G. GOODRICH ET AL.,

Defendants in Error.

No. 335

BRIEF FOR PLAINTIFFS IN ERROR

Statement of the Case.

This is an action at law in trespass to try title (similar to the common law action in ejectment) under the Texas statute, begun in the United States District Court for the Eastern District of Texas, at Beaumont. The jurisdiction of the District Court is by reason of diversity of citizenship of the parties.

This case reached this court by certiorari, granted January 31, 1916, to review the judgment of the Circuit Court of Appeals for the Fifth Circuit affirming the judgment of said District Court entered December 1, 1914, in favor of defendants in error, against plaintiffs in error.

There is involved in this suit 2578 acres of pine timber land, out of the Charles A. Felder league (4428 acres), in Hardin County, Texas, granted to Charles A. Felder under the colonization laws of the Government of Coahuila and Texas, August 29, 1835.

Upon the establishment of the Government of the Republic of Texas, after the Declaration of Texas Independence (March 2, 1836), in the subdivision of the Republic into counties, this league of land fell in Liberty County. In subsequent changes of the boundaries of counties, and in the establishment of new counties, it has been located in Menard County, Tyler County, and in Hardin County, in the order named. It is agreed in this case that all of the records of Liberty County were destroyed when the courthouse burned, in 1874. Much of the controversy in this case arises by reason of the destruction of such records, and the ruling of the trial judge and the Circuit Court of Appeals as to the records of Menard County. Such ruling presents questions not only important in this case, but which also affect many titles. Menard County included territory about as large as the State of Delaware.

Cornelia G. Goodrich, Edward L. Montgomery, Jr., Margaret W. Montgomery, Edward L. Montgomery and wife, Mary W. Montgomery, Helen M. Krasica and husband, Jean Krasica, were plaintiffs in the trial court, their original petition having been filed June 7, 1911. When necessary to distinguish these from the other defendants in error, they are referred to as plaintiffs.

Fannie M. Allen, Mary M. Steadman, Ophelia M. Cox and husband, Louis L. Cox, intervened in this cause April 1, 1912, pleading over against both plaintiffs and defend-

ants. When necessary to distinguish these parties from the other defendants in error they are referred to as interveners.

The defendants in the trial court were: Houston Oil Company of Texas, Kirby Lumber Company, and Maryland Trust Company, who are plaintiffs in error here. The Texas Builders Supply Company was also a defendant in the trial court. It held under and as agent of the Houston Oil Company of Texas.

The first trial of this cause was in November, 1912, and the trial judge peremptorily instructed a verdict for defendants in error, and judgment was rendered thereon December 2, 1912. Plaintiffs in error prosecuted writ of error to the Circuit Court of Appeals for the Fifth Circuit, and that court reversed and remanded the cause. (213 Fed., 136.) Defendants in error thereupon presented to this court a petition for certiorari, which was denied. (234 U. S., 759-761.)

The second trial in the District Court occurred in November, 1914, and the trial court again refused to submit to the jury any issue except whether plaintiffs in error had title under the Texas five-year statute of limitation. The verdict of the jury on that issue was against plaintiffs in error, and judgment was rendered for defendants in error December 1, 1914. Plaintiffs in error prosecuted writ of error to the Circuit Court of Appeals for the Fifth Circuit, which court affirmed the judgment of the trial court (226 Fed., 434), and this court granted writ of certiorari as stated.

At the time of the filing of this suit plaintiffs in error were in possession, by their agent, said Texas Builders' Supply Company.

Charles A. Felder, the original grantee, is the common source of title. Plaintiffs in error claim under *senior* deed from Charles A. Felder to William A. Daniel, dated *June 10, 1839*; defendants in error (both plaintiffs and interveners) claim under *junior* deed from Charles A. Felder to John A. Veatch, dated *June 18, 1839*. This is a combat, therefore, between such *senior* and *junior* titles. In addition to the claim under such senior deed, plaintiffs in error claim under the Texas statute of limitation of three, five and ten years. Plaintiffs in error deny the execution by Charles A. Felder of the deed to John A. Veatch, and defendants in error deny the execution by said Felder of the deed to William A. Daniel, and of deed from Daniel to Thomas J. Word.

During the prosecution of writ of error from the judgment of December 2, 1912, defendants in error caused process to be issued on said judgment, and plaintiffs in error were ejected, and also required to pay over to defendants in error certain money damages and costs recovered thereby. Upon the reversal of the judgment of December 2, 1912, plaintiffs in error moved the District Court for restitution. This was denied, and complaint is made thereof, and this court is asked to order restitution.

Since this suit was filed, defendants in error have appropriated all the pine timber on the land in controversy (same being its chief value), the greater portion thereof being appropriated since this court granted certiorari herein, and this court is asked to order restoration of the *status quo* of this property as it was at the time of filing suit, by requiring the production of the value of such timber or other appropriate relief.

First Specification of Error.

Plaintiffs in error (defendants in trial court) were deprived of their constitutional right of trial by jury by the holding of the trial judge that the deed from Charles A. Felder to William A. Daniel, dated June 10, 1839, which was recorded on the Menard County, Texas, records, February 23, 1842, and is still so recorded (which record was admitted in evidence), under which plaintiffs in error and their vendors claim and have actively claimed for more than seventy years, was not in fact executed, and by the refusal of the trial judge to submit the issue of the execution of said deed to the jury.

Special charge No. 9 (Rec., p. 769) was duly presented, requesting the submission of this issue, and was refused. Omitting heading and signature, same is as follows:

"You are instructed that it is claimed by the defendants in this cause that Charles A. Felder, on the 10th day of June, 1839, made, executed and delivered to William A. Daniels a deed conveying to the said Daniels the Charles A. Felder league in Hardin County, Texas, a part of which league of land is in controversy herein, and it is a question of fact for you to determine whether such deed from the said Charles A. Felder to the said Wm. A. Daniels was in fact made, executed and delivered. You are instructed that the making, execution and delivery of a deed may be shown by circumstances. In other words, the law on this point is that a deed may be shown by circumstances like any other fact, it being a question for the decision of the jury, and if you shall believe, upon a consideration of all the facts and circumstances in the case before you, that the circumstances are consistent with the inference or presumption that such a deed was made by the said Felder to the said Daniels, as claimed, and that in view of all the circumstances it is more reasonably probable that such

deed was made than that it was not, then the jury is at liberty, and it is the jury's duty to presume and find that such deed, as claimed, was in fact made, executed and delivered by the said Felder to the said Daniels, and to give the same the effect to which it is entitled, as elsewhere explained in the court's charge."

Exceptions to the refusal of the trial judge to submit such issue were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., p. 875.)

Second Specification of Error.

The trial court erred, to the prejudice of plaintiffs in error, in excluding, when offered in evidence by plaintiffs in error, a certified copy of the deed from Charles A. Felder to William A. Daniel, dated June 10, 1839, under which plaintiffs in error and their vendors actively claim and have claimed for more than seventy years, said copy of said deed being from the records of Menard County, Texas, upon which records same was spread February 23, 1842, and being certified by the Clerk of the County Court of Tyler County, the present legal custodian of said Menard County records.

Previous to the offer of the *certified copy* of the Felder to Daniel deed, the plaintiffs in error had offered, and the court had *admitted in evidence* as a circumstance to prove the execution, etc., of said deed, the original Menard records themselves, and spread thereon this deed. (Rec., pp. 340-344.) The offer of the certified copy is shown by the Record. (Rec., p. 360.)

The said copy, omitting certificate of custodian, about which certificate no question is raised, is as follows, same being of record in Vol. A, p. 119, Menard County records. (Rec., pp. 340-342.)

“Republic of Texas,
 “Jasper County.

“Be it known, that on this 10th day of June, Eighteen Hundred and Thirty-nine, I, *Charles A. Felder*, of the County of Jefferson & Republic aforesaid, for & in consideration of the sum of One Thousand Dollars to me in hand paid the receipt whereof is hereby acknowledged have this day granted, bargained, sold and conveyed and by these presents do grant bargain sell & confirm in *bona fide* sale to William A. Daniels of the County of San Augustine & Republic aforesaid all that tract of land containing Four thousand four hundred & Twenty-eight acres of land commencing on the W. bank of the River Neches & running thence W. 9.816 yards Thence South 2500 yards Thence E, 10,635 yds. to said River Thence with said River to the place of beginning 15 labors arable 10 labors grazing land it being the league of land granted George A. Nixon commissioner of Zavallas Colony on the 29th August 1835 and for a more particular description of which reference is hereby made to the original lot & field notes on file & of record in the General Land Office of this Republic and for the aforesaid William A. Daniels his heirs and assigns to have and to hold said land together with all and singular the rights rents members and appurtenances thereunto belonging or appertaining and I the said Charles A. Felder do and will for myself my heirs executors administrators and assigns forever warrant and defend the above described league of land unto the said William A. Daniels his heirs and assigns, not only against myself my heirs and assigns but against the claim of all other persons whatsoever claiming or to claim the same or any part thereof. In Testimony whereof I have hereunto set my hand and affix my seal on the day and date above written.

(Seal)

“Charles Felder.

“Signed Sealed and delivered in the presence of
 “Charles A. Clavinger.
 “N. H. Lant.”

"The Republic of Texas,

"County of Jasper.

"Personally appeared before at my office
Charles A. Felder who acknowledged to the above and
foregoing deed for the use and purposes therein con-
tained and set forth. Given under my hand and seal
of office in the Town of Jasper this the 10th June
A. D. 1839.

"Wm. Myers,
"Notary Public."

"Republic of Texas,

"County Menard.

"I do hereby certify that the above is a true copy
of the original as recorded in my office this the 23rd
day of February, 1842.

"James B. Arnett,
"By C. C. Arnett, D P County Recorder."

The objections by defendants in error and the court's
ruling were (Rec., pp. 360 and 361):

"*Mr. Whitaker:* We object to that deed as a
muniment of title, on the grounds stated:

"First, because the defendants have not properly
accounted for the original instrument as a predicate
for introducing a certified copy.

"Second, because the certified copy does not come
from the officer who under the law is the proper cus-
todian of the records of Menard County, the proper
custodian of such records being the clerk of the County
Court of Liberty County.

"Third, because the deed was never acknowledged
before any officer whatever, the purported officer,
Wm. Myers, who signs himself as a notary public,
was not a notary public at that time, and to aid the
court's judicial knowledge of that fact, we offer in
connection with this objection a certificate of the
Secretary of State of Texas showing such fact—that
William Myers was not a notary public.

"Fourth, that if he had been a notary public, he
did not have at that time the right or power to take

the proof of a deed, and, therefore, his authentication of a deed as a notary public, if he was such, is a nullity.

"Fifth, because the deed purports to be executed by Charles Felder, and not Charles A. Felder, and that Charles Felder and Charles A. Felder is not one and the same person, and there is no proof which shows such to be a fact. There is no proof of identity and on top of that, we say we have filed an affidavit of forgery, which places upon them the burden of establishing this deed as at common law, and they have failed to produce any fact here which shows that Charles A. Felder ever executed that deed."

The trial judge, in his ruling, apparently sustained only one of these objections; his comment is as follows:

"The question presented is one that everybody connected with the case ought to give careful attention to, because it is a vital question in the case. *If I should err in the admission of the testimony, of course it would be such error as would be vital to the judgment in the case. If the instrument is admissible, and I exclude it, I think it would be a fatal error, and if it is not admissible, it would be error to let it in.* Therefore, I have been glad to hear the discussion. It has been enlightening to me, and enabled me to give a great deal of thought to the subject. I have one view of it that is somewhat different from the view you present. In other words, I understand the validating acts were to relieve against improper records of otherwise genuine instruments. It is where on account of the crudeness of acknowledgments, or the carelessness of official business, that conveyances have gone upon the records improperly that the legislature have passed the acts on account of public policy, and has provided that if those instruments have been recorded 10 years they shall be valid for all intents and purposes, as though the records were sufficient in the first instance. I draw a distinction between that class of cases and a deed that has been assailed in the trial by the filing of an affidavit of forgery, and to my mind it is a very vital

matter between the two character of cases. I have here a very carefully prepared brief, which I think is a correct digest of the authorities and the law, as declared in the adjudicated cases where a deed has been recorded for thirty years, and a certified copy is offered, being duly filed among the papers, with an affidavit of the loss of the original, the same is admissible in evidence in like manner as the original would be. The certified copy of the record stands as the original deed on the record. In order to admit the original, it must be proved, first, that it came from the proper custody; second, that it is free from suspicion; third, that the facts corroborative of its genuineness shall be produced. Proper custody may be presumed from a proper and valid record of the deed. I think it is a fair deduction from the law in 77 Texas, among other expressions in the opinion of the court, that the registration does not constitute notice, nor would any lapse of time make admissible as an ancient instrument a certified copy from the record of the deed. An instrument that is 30 years old that comes from the proper custody, that comes free from circumstances of suspicion, and comes connected with facts corroborative of its genuineness, is admissible, because it proves itself as an ancient instrument. If an instrument goes on the record improperly, then the production of the record 30 years old would not show that it came from the proper custody, because it went on the record improperly. *I am inclined to think that the instrument was not properly recorded. That William Myers, at the time of taking the acknowledgment, was not a notary public, and the law in force at that time did not authorize William Myers as a notary public to take the acknowledgment. Therefore, that being true, the deed having gone to record improperly, it fails to possess that element of its legal standing as an ancient instrument, in not coming from the proper custody. I sustain the objection."*

Plaintiffs in error duly excepted (Rec., p. 363), and assigned error. (Rec., p. 957.)

Third Specification of Error.

Plaintiffs in error (defendants in the trial court) were deprived of their constitutional right of trial by jury by the holding of the trial judge that the purported deed from Charles A. Felder to John A. Veatch, dated June 18, 1839, under which defendants in error (plaintiffs and intervenors) claim, was in fact executed, and by the trial judge's refusal to submit that issue to the jury.

Special charge No. 3 (Rec., 762) was duly presented, requesting the submission of this issue, and was refused. Omitting heading and signature, same is as follows:

"You are instructed that before plaintiffs and interveners can recover in this suit, they must show title in themselves to the land in controversy. A forged deed does not pass title to land in this State to the vendee named therein, nor to any persons claiming to deraign title from the vendee in such forged deed.

"Therefore, if you shall believe from the evidence, that is to say, from all the facts and circumstances which the court has permitted to be introduced before you, that the deed which has been offered in evidence by the plaintiffs and interveners, and which purports to have been executed by Charles A. Felder in favor of John A. Veatch on the 18th day of June, 1839, under which said deed both the plaintiffs and the interveners in this cause claim title, was not in fact executed by the said Charles A. Felder to the said John A. Veatch, but was a forgery, as claimed by the defendants in this cause, then, regardless of your findings on any other issue, you are instructed to proceed no further; but in such event let your verdict be in favor of the defendant, Houston Oil Company of Texas, for all the land sued for by both the plaintiffs and interveners, and that neither the plaintiffs nor the interveners take anything as against either of the defendants herein. In this connection you are in-

structed that whether or not the said purported deed from the said Charles A. Felder to the said John A. Veatch was in fact made and executed by the said Felder to the said Veatch, or whether the same is a forgery, is a question of fact for you to determine from all the facts and circumstances in evidence before you."

Exceptions to the refusal of the trial judge to submit said issue were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., p. 872.)

Fourth Specification of Error.

Plaintiffs in error (defendants in trial court) were deprived of their constitutional right of trial by jury by the holding of the trial judge that John A. Veatch was a *bona fide* innocent purchaser for value of the land in controversy, under the *junior* deed out of Felder (June 18, 1839, and under which defendants in error claim), without notice of the *senior* deed out of Felder to Daniel (June 10, 1839, under which plaintiffs in error claim), or the claim thereunder, and by the refusal of the trial judge to submit such issue to the jury.

Special charges Nos. 10 and 11 (Record, pages 770 and 771) were duly presented, requesting the submission of the issue, and were refused. Omitting heading and signature, same are as follows:

Special charge No. 10:

"You are instructed that if you shall find that on the 10th of June, 1839, Charles A. Felder, to whom the Felder league of land in Hardin County, Texas, was originally granted, made and executed a deed whereby the said Felder on that date conveyed to one William A. Daniels the said Felder league of land, neither the plaintiffs nor the interveners can recover

any portion of the land as claimed by them, unless you shall believe from the facts and circumstances before you that the deed which has been read in evidence before you by the plaintiffs purporting to have been executed by the said Charles A. Felder on the 18th day of June, 1839, in favor of one John A. Veatch, was in fact made and executed by the said Charles A. Felder to the said John A. Veatch, and unless you shall also further find and believe from the facts and circumstances in evidence before you that the said John A. Veatch did not have notice or knowledge at the time he took said deed from the said Felder, if he did, of the prior deed made by the said Felder to the said William A. Daniels, if you find it was so made, executed and delivered, and unless you further find that John A. Veatch paid to the said Felder for said land a valuable consideration."

Special charge No. 11:

"You are instructed that if you shall find that the purported deed from the said Charles A. Felder to the said John A. Veatch was in fact executed by the said Charles A. Felder to the said John A. Veatch, then in determining the issue of whether or not the said John A. Veatch paid to the said Charles A. Felder a valuable consideration for the said property, and whether the said John A. Veatch had notice of said deed from Charles A. Felder to the said William A. Daniels, if you find that such a deed was so executed, you may consider the claim of ownership asserted to the Felder league of land by the defendants and those under whom they claim herein, if any, and their rendition of said land for taxes, if any, and their payment of taxes thereon, if any, and the exercise of such acts of ownership as you shall find from the evidence that the defendants herein and those under whom they claim exercised, if any, claiming under the deed to the said William A. Daniels, if any, and also the course of dealing, that is to say, the sales and transfers of said land, if any, among the defendants' predecessors in title."

Exceptions to the refusal of the trial judge to submit said issue were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., pp. 876, 877, 888, 889.)

Fifth Specification of Error.

The trial court erred, to the prejudice of plaintiffs in error (defendants in trial court), in refusing to instruct the jury to return a verdict for plaintiffs in error, because, by reason of the long, active claim of plaintiffs in error and their vendors under the *senior* deed from Charles A. Felder to William A. Daniel, and the dormancy and non-claim of defendants in error (plaintiffs and interveners) and their vendors under the *junior* deed from Charles A. Felder to John A. Veatch, it will be presumed in favor of the active title, after the long lapse of time, that said John A. Veatch did have notice of such senior deed, and that he was not a *bona fide* innocent purchaser for value of said land.

Special charge No. 1 (Rec., p. 760) was duly requested, and was refused. Omitting heading and signature, same is as follows:

"You are instructed to render in this cause a verdict in favor of the defendant Houston Oil Company of Texas, for all the land sued for and claimed by the plaintiffs and the interveners in this cause, as the same is described in the petitions of said plaintiffs and said interveners, and also that the plaintiffs and interveners take nothing as against either of the defendants, Kirby Lumber Company or the Maryland Trust Company."

Exceptions to the refusal of the trial judge to give said charge were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., pp. 865 and 867.)

Sixth Specification of Error.

Plaintiffs in error (defendants in trial court) were deprived of their constitutional right of trial by jury by the holding of the trial judge that the deed from Charles A. Felder to William A. Daniel, dated June 10, 1839, was not presented for record in Liberty County, Texas (in which the land was then situated, and which records were destroyed by fire in 1874), before June 18, 1839, the date of the alleged execution of the deed from Charles A. Felder to John A. Veatch, under which defendants in error (plaintiffs and interveners) claim, and deprived of the presumption, by reason of the long, active claim thereunder, that it was so presented for record, by the refusal of the trial judge to give their special charge No. 7.

Special charge No. 7 (Rec., p. 767) was duly presented, requesting the submission of the issue, and was refused. Omitting heading and signature, same is as follows:

“You are instructed that if you find that a deed was made and executed and delivered by Chas. A. Felder to William A. Daniels on the 10th day of June, 1839, conveying the Charles A. Felder league in Hardin County, that the presumption is that said deed had been presented to the clerk of the County Court of Liberty County, Texas, for record at the time the purported deed from Chas. A. Felder to John A. Veatch was executed, if you find it was executed, and, therefore, unless it has been shown either by facts or circumstances before you that the said deed from the said Felder to the said William A. Daniels, if you find that there was such a deed, had not in fact been presented for record in said Liberty County, Texas, at the time of the execution of the deed from the said Felder to the said Veatch, if you find it was executed by the said Felder, then neither the plaintiffs nor the interveners can recover anything in this suit, and you will find for the defendant.”

Exceptions to the refusal of the trial judge to submit said issue were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., pp. 885 and 886.)

Seventh Specification of Error.

Plaintiffs in error (defendants in trial court) were deprived of their constitutional right of trial by jury by the holding of the trial judge that the senior deed from Charles A. Felder to William A. Daniel, dated June 10, 1839, under which plaintiffs in error claim, was not presented for record in Liberty County, Texas (in which county the land was then situated, and which records were destroyed by fire in 1874), before June 18, 1839, the date of the alleged execution of the deed from Charles A. Felder to John A. Veatch, under which defendants in error (plaintiffs and intervenors) claim, and the trial judge's refusal to submit such issue to the jury.

Special charge No. 5 (Rec., p. 765) was duly presented, requesting the submission of this issue, and was refused. Omitting heading and signature, same is as follows:

“You are instructed that if you shall find from the evidence, that is, such facts or circumstances as the court has permitted to go before you, that a deed from the said Charles A. Felder to the said William A. Daniels, dated June 10, 1839, conveying the Charles A. Felder league in Hardin County, Texas, had been executed and delivered, and had been presented to the clerk of the County Court of Liberty County, Texas, for record, at or prior to the time the deed from the said Charles A. Felder to the said John A. Veatch was executed, if it was executed, then you are instructed that the said John A. Veatch had constructive notice of the execution of the prior deed by the said Felder to the said Daniels, if you find

that such a deed had been so executed, and that by the execution of the deed from the said Felder to the said Veatch, if the same was executed by the said Felder, no title passed to the said John A. Veatch, and in such event, if you so find the fact to be, your verdict must be in favor of all the defendants herein, as against both the plaintiffs and interveners."

Exceptions to the refusal of the trial judge to submit said issue were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., p. 883.)

Eighth Specification of Error.

Plaintiffs in error (defendants in trial court) were deprived of their constitutional right of trial by jury by the holding of the trial judge that plaintiffs in error had not perfected title to the land in controversy under the Texas ten-year statute of limitation, and by the refusal of the trial judge to submit to the jury said issue.

Special charge No. 16 (Rec., pp. 778 and 779) was duly presented, requesting the submission of this issue, and was refused. Omitting heading and signature, same is as follows:

"The statutes of this State provide that any person who has the right of action for the recovery of any land against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action therefor shall have accrued, and not afterward.

"Therefore, if you shall believe from the evidence before you that the defendant Houston Oil Company of Texas, or the Texas Pine Land Association, or both of them together, had and held peaceable and adverse possession of the Felder league of land, by or through another, as agent, employe, or tenant,

and that such possession continued for as long a period of time as ten consecutive years, cultivating, using or enjoying the same, then neither the plaintiffs nor the interveners can recover anything in this suit, and if you so find the facts to be, your verdict will be for the defendants."

Exceptions to the refusal of the trial judge to submit such issue were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., pp. 896 and 897.)

Ninth Specification of Error.

Plaintiffs in error (defendants in trial court) were deprived of their constitutional right of trial by jury by the holding of the trial judge that plaintiffs in error had not perfected title to the land in controversy under the Texas three-year statute of limitation, and by the refusal of the trial judge to submit to the jury said issue.

Special charge No. 15 (Rec., p. 776) was duly presented, requesting the submission of this issue, and was refused. Omitting the heading and signature, same is as follows:

"You are instructed that among other defenses interposed by the defendants herein, is the statute of limitation of three years, which defense is interposed as against both the plaintiffs and the interveners, and as to this defense you are instructed as follows:

"The statute of this State provides that every suit to be instituted to recover land in this State as against any person in peaceable and adverse possession thereof under title or color of title shall be instituted within three years next after the cause of action shall have accrued and not afterward.

"By the term 'title' as used above is meant a regular chain of transfer from or under the sovereignty of soil, and by 'color of title' is meant a consecutive

chain of such transfers down to such person in possession, without being regular, as if one or more of the memorials be only in writing or such like defect as may not extend to or include the want of intrinsic fairness and honesty.

“ ‘Peaceable possession,’ as used above, is such as is continuous for a period of three years, and not interrupted by adverse suit during such period of three years to recover the land.

“ ‘Adverse possession’ is an actual and visible appropriation of the land, commenced and continued under a chain of right inconsistent with and hostile to the claim of another.

“Peaceable and adverse possession of land need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them; but in this connection you are instructed that in order to constitute the peaceable and adverse possession above defined, it is not required that the person or persons to whom the deed or deeds are made for the land shall actually be in possession thereof in his own proper person, but it is sufficient to constitute possession if the same is held by an agent or representative or tenant of such person claiming the land by deed, and that such holding by such agent, representative or tenant is for the person or persons claiming the land under such deed or deeds.

“Therefore, if you shall believe from the evidence that the defendant, Houston Oil Company of Texas, or any person or persons under whom it claims by privity, as shown by deeds introduced in evidence before you, or any two or more of them by an agent, representative or tenant, was in peaceable and adverse possession of the Charles A. Felder league of land in Hardin County, Texas, for a period of three successive years at any time before this suit was filed, which was on the 7th day of June, 1911, and that such defendant, Houston Oil Company of Texas, or its predecessors in title during said time, were claiming said league of land, or the 2578 acres thereof involved in this suit, under said deed or deeds, then

you are instructed to find in favor of the defendant, Houston Oil Company of Texas, for all of the land sued for by the plaintiffs and interveners herein."

Exceptions to the refusal of the trial judge to submit such issue were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., pp. 894 to 896.)

Tenth Specification of Error.

The trial court erred, to the prejudice of plaintiffs in error (defendants in trial court) by refusing to instruct the jury that in considering the claim of plaintiffs in error of title under the three, five and ten-year statutes of limitation, that under the contracts between the Houston Oil Company of Texas and the Texas Builders Supply Company, and the other evidence, the possession of such supply company of a *portion* of the land in controversy was as agent or contractor of the oil company, and was the possession of the oil company, and would be construed to embrace all the land in controversy described in the deeds under which the oil company holds (such deeds cover all the land in controversy), and that this was true whether such supply company was, or was not, under said contracts and the evidence, *restricted* to such portion in its actual possession.

This was duly presented by special charges Nos. 19, 20, 21 and 22 (Rec., pp. 783-786), requesting the submission of this issue, and same were refused. Omitting heading and signatures, same are as follows:

Special charge No. 19:

"You are instructed that where one has actual possession of any part of a tract of land claimed by him, by virtue of a deed or other writing, though not in

actual possession of the entire tract conveyed by said deed, still, in law, his possession of a part of the same is the possession of all of said tract so described in his deed.

"Therefore, if from the evidence you believe that the Houston Oil Company of Texas, or those under whom it claims, claimed all of the land in controversy under and by virtue of a deed or deeds or other writings, and so claiming all of the land in controversy, entered into and upon and took possession of a part of said land, such possession of a part thereof would, in law, be a possession to the extent of the land described in said deed or deeds, and such possession, if any, would be co-extensive with the boundaries designated in such deed or deeds."

Special charge No. 20:

"You are instructed that if you believe from the evidence that the Houston Oil Company of Texas, or those under whom it claims, claimed the Charles A. Felder league, or the 2578 acres thereof in controversy herein, by virtue of a deed or deeds, and you further believe from the evidence that while so claiming under said deed or deeds, if any, it, they, or their agents, tenants or lessees, if any, entered into and upon, and reduced to possession, a part of said land, then you are instructed further that such possession, if any, of said Houston Oil Company of Texas, or those under whom it claims, of a part of said land, in law would be the possession of the whole of said land so claimed by it or them under and by virtue of said deeds to it or them, if any."

Special charge No. 21:

"You are instructed that a party in possession of land, either in person or by his agent, tenant or lessee, holds to the extent of the boundaries of the land described in his deed, when he holds and claims under and by virtue of a deed or deeds, describing such tract of land so claimed by him."

Special charge No. 22:

"You are instructed that, under the contract or contracts, if any, between the Houston Oil Company of Texas and the Texas Builders' Supply Company as shown by the evidence before you, an entry under said contract or contracts, if any, upon said land in controversy herein and use thereof, if any, by said Texas Builders' Supply Company, was, in law, an entry upon and use of said land by said Houston Oil Company of Texas.

"And you are further instructed that if you believe from the evidence before you that the Texas Builders' Supply Company, under said contract or contracts, if any, did enter upon the land in controversy herein, and did remove sand therefrom, or did otherwise use or enjoy same, such acts, if any, in removing sand or otherwise using or enjoying said land, would, if continued for the proper length of time, under a claim of right and ownership, as elsewhere explained to you in this charge, be sufficient to constitute title in favor of defendant Houston Oil Company of Texas; and you should find for the defendants."

Exceptions to the refusal of the trial judge to submit such issue were saved (Rec., pp. 791 and 805), and the action assigned as error. (Rec., pp. 900-902, 905-907.)

Eleventh Specification of Error.

The trial court erred, by refusing (before ordering a second trial of this cause) to order restitution, of the premises in controversy, to plaintiffs in error, and of the sums of money collected from plaintiffs in error, which premises had been taken out of the possession of plaintiffs in error and placed in the possession of defendants in error (plaintiffs and intervenors), said sums collected under process issued on the judgment rendered in this cause

on the first trial (December 2, 1912), which judgment had been reversed by the Honorable Circuit Court of Appeals for the Fifth Circuit.

Pending prosecution by plaintiffs in error of writ of error from the judgment rendered on first trial (December 2, 1912), defendants in error caused execution to issue on said judgment, and collected from the Houston Oil Company of Texas \$1,506.37 as damages, interest, and costs recovered in said judgment. (Rec., pp. 30-33.) Also, defendants in error caused writ of possession to issue, and plaintiffs in error and their agent, Texas Builders' Supply Company, were ejected from the tract of land in controversy, and defendants in error placed in possession. (Rec., pp. 34-36.) At the November, 1914, term of the District Court, which was the first term of court after the filing of the mandate on the reversal of the judgment of December 2, 1912, by the Circuit Court of Appeals, plaintiffs in error moved in the District Court for restitution of the premises and said sums of money. (Rec., pp. 36-49.) The trial judge refused to rule upon such motion for restitution, and, over plaintiffs in error's protest, placed the case upon trial without ordering restitution, and after the entry of the judgment of December 1, 1914, overruled and denied said motion. (Rec., p. 810.) The action of the court was assigned as error. (Rec., pp. 921-923.)

Twelfth Specification of Error.

This court, upon the reversal of the judgment of the trial court of December 1, 1914, and the Circuit Court of Appeals affirming same, will, we submit, enter its order directing restitution of the premises in controversy taken

from plaintiffs in error under the judgment of December 2, 1912, which judgment was reversed by the Circuit Court of Appeals, and restitution of the moneys paid by plaintiffs in error to defendants in error under said judgment of December 2, 1912, also direct the restoration of the *status quo* of the property, as it was at the time of the filing of this suit, by requiring defendants in error to pay to plaintiffs in error or into the registry of the court the value of the timber cut from the premises by defendants in error, pending the prosecution of the writ of error from the judgment of December 2, 1912, and pending the prosecution of this writ of error; or, if this court will not so direct, an order will pass directing the United States District Court for the Eastern District of Texas so to do.

Under the eleventh specification of error, we have shown that possession of the land in controversy was taken from plaintiffs in error and placed in possession of defendants in error, and said moneys collected from plaintiffs in error, under process issued on the judgment of December 2, 1912, which was reversed by the Circuit Court of Appeals. Since this cause has been pending in this court, plaintiffs in error have presented to this court a motion that defendants in error et al. be held in contempt of this court for having appropriated the pine timber from the land in controversy during the pendency of this suit. In defendants in error's answer to said motion for contempt, they admit that during the pendency of this suit they have sold the pine timber on the tract of land in controversy, and the same has thereby been cut, removed and appropriated during the pendency of this suit.

BRIEF OF THE ARGUMENT.

First Specification of Error, that Issue of Execution of Deed from Felder to Daniel Should Have Been Submitted to the Jury:

By holding that the deed from Felder to Daniel was not executed, and in refusing to submit the issue to the jury, the trial judge, in the light of the long, active claim thereunder and of said deed being spread upon the records of Menard County since 1842, which records the court *admitted* in evidence, committed error greatly prejudicial to plaintiffs in error.

We believe the recognized rule is well stated in *Phoenix Mutual Life Ins. Co. v. Doster* (106 U. S., 30), where it is said:

“The facts and circumstances established by the testimony are sufficiently indicated in the charge of the court, to certain parts of which, to be presently examined, the company objected. It is enough to say that the testimony was ample to enable each party to go to the jury upon the substantial issues in the case. The motion, at the close of the plaintiff’s evidence, for a peremptory instruction for the company, was properly denied. It could not have been allowed, without usurpation, upon the part of the court, of the functions of the jury. *Where a cause fairly depends upon the effect or weight of testimony, it is one for the consideration and determination of the jury, under proper directions as to the principles of law involved.* It should never be withdrawn from them, unless the testimony be of such a conclusive character as to compel the court, in the exercise of a sound judicial discretion, to set aside a verdict returned in opposition to it. *Greenleaf v. Birth*, 9 Pet., 299; *U. S. v. Laub*, 12 Pet., 5; *Weightman v. Washington*, 1 Black, 49; 66 U. S., XVII, 57; *Bank*

v. Guttischlick, 14 Pet., 31; Bevens v. U. S., 13 Wall., 62; 80 U. S., XX., 533; Hendrick v. Lindsay, 93 U. S., 146 (XXIII, 856)."

Also:

Delk v. Railroad, 220 U. S., 580; 55 Law Ed., 590.
Bamberger v. Schoolfield, 160 U. S., 149; 40 Law Ed., 374.

Gardner v. Railway, 150 U. S., 349; 37 Law Ed., 1107.
City & Sub. R'y v. Svedborg, 194 U. S., 201; 48 Law Ed., 935.

Railway v. James, 163 U. S., 485; 41 Law Ed., 236.
White v. Van Horn, 159 U. S., 3; 40 Law Ed., 55.

As stated, the common source of title is Charles A. Felder, and plaintiffs in error claim under *senior* deed out of him (*i. e.*, Charles A. Felder to William A. Daniel, dated *June 10, 1839*), and defendants in error (plaintiffs and interveners) claim under purported junior deed out of him (*i. e.*, Charles A. Felder to John A. Veatch, dated *June 18, 1839*).

Upon the trial of this cause defendants in error filed under the Texas statute an affidavit claiming that the deed from Felder to Daniel is a forgery. (Rec., p. 51.) This affidavit was filed November 1, 1912, more than seventy-three years after the date of the deed, and more than seventy years after it had been spread upon the records of Menard County, where it has since remained and where it is now. This affidavit, however, is purely formal, and under the Texas law is merely a pleading and not evidence the effect of which was to make it necessary for petitioners to prove the execution of such deed. Such proof, however, could be made either under the Common Law or under the Texas Statutes by introduction of certified copy of the deed from the records.

It should be observed that the necessity for the proof of the execution of such deed, under which plaintiffs in error hold this valuable property, and under which plaintiffs in error and their vendors have claimed same for more than seventy years, during a large portion of which time taxes have been paid thereon and open use made thereof, is now placed upon them after all the parties to said instrument, as well as the witnesses and authenticating officer, are dead; and after all other persons then residing in the then thinly settled community, who might by chance have known of said transaction, have either died, or time has dimmed their memories. And, as we will hereafter fully point out, this claim and assertion of title has been without substantial protest from defendants in error or those under whom they claim.

Search for the *original* deed from Felder to Daniel was exhaustive and unavailing. (Testimony of H. M. Richter, Rec., pp. 308-313; Chas. T. Butler, Rec., p. 313; Horace Word, Rec., p. 316; J. M. Cook, Rec., p. 332.)

The next step in logical order was the records of Liberty County, where the land was situated at the date of the deed. These records were entirely destroyed by fire when the courthouse of Liberty County burned in 1874, and the custodian thereof at the time of the execution of the deed is dead. (Agreement, Rec., p. 58.)

The next step was the records of Menard County, which county was carved out of Liberty County, and where the land was next situated. On these records of Menard County the deed is recorded, having been spread thereon in 1842 and having remained there since. A certified copy of the deed taken from the records of Menard County and certified by the County Clerk of Tyler County, in whose custody said Menard County records now

are, was offered in evidence, and excluded by the trial judge. Plaintiffs in error complain of the exclusion of said certified copy (second specification of error), and such complaint is hereinafter fully presented and discussed. It should be borne in mind that the exclusion of the certified copy was not because of any suspicion of the genuineness of the Menard County records, but because of objections to said copy based entirely upon technical constructions of the language of Texas statutes permitting the use of certified copies, and a technical construction of certain acts concerning such Menard records.

Plaintiffs in error brought into court and offered the Menard records themselves, and the deed in question from Charles A. Felder to William A. Daniel spread thereon. They were brought into court in the custody of the clerk of the County Court of Tyler County, who, according to the Texas statutes and the holdings of the Texas courts, is their proper custodian. (Rec., p. 338.) They bore on their face evidence of age, and such records with such deed thereon were *admitted in evidence*. The ruling of the court admitting same (Rec., p. 344), is, in part, as follows:

“The plaintiffs and interveners have objected and their objections are overruled and the record book of Menard County from the custody of the County Clerk of Tyler County is allowed to go to the jury, not for the purpose of showing that Charles A. Felder parted with the title to the land, but as a circumstance to be considered by the jury in determining the question as to whether or not Charles A. Felder did deed the land described in that deed to William A. Daniels—that is to say, the court permits you to receive the old record book from Tyler County with the view of taking that and all other circumstances that may be presented to determine whether in point of fact Charles A. Felder did deed the land to Daniels, and

for that purpose alone, and it is not to be considered by the jury as a muniment of title for the land, but as a record permitted to go to the jury to be given by you such weight as you think proper in determining the question of whether Charles A. Felder deeded the land to Daniels."

This ruling, however, was in the course of the trial of the cause, and when the trial judge came to charge the jury he refused to submit to the jury the issue of the execution of the deed, basing his action, presumably, upon the theory that such records of Menard County and such deed spread thereon, and long, consistent claim of title and acts of ownership under such deed, were not sufficient to entitle the issue of the execution of such deed to go to the jury.

When Texas declared her independence (March 2, 1836), and the Republic of Texas came into being, owing to the country being sparsely settled, the counties which were the subdivisions of the Republic were necessarily large. The territory composing Liberty County, where this land was at the date of this deed, was probably as large or larger than many of the New England States.

On January 22, 1841, the Congress of the Republic of Texas passed the following act (Laws of Texas, Gammel, Vol. 2, p. 538). We quote same, omitting, however, the boundary lines (*italics ours*):

"Sec. 1. Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled: That all that portion of the County of Liberty comprised in the following limits, to wit, * * * be, and the same is hereby constituted a separate district or territory, for judicial and other purposes and privileges enjoyed by the inhabitants of the several counties of this Republic, *except that of separate representation in Congress, which privilege shall be exercised as heretofore.*

"Sec. 2. Be it further enacted, That the above described territory shall be known and styled by the name of 'Menard,' and shall be organized in conformity with an act organizing the inferior courts, and defining the powers and jurisdiction of the same, and the inferior courts shall be holden in the same, on the first Mondays of February, June and December, in each year.

"Sec. 3. Be it further enacted, That Robert Barclay, John Carson, Josiah Wheat, Addison Sapp, Benjamin Berk, are authorized to select two sites, which shall be proposed to the people, and the place receiving the greatest number of legal votes shall be the site where the district and inferior courts shall be holden, and the above named commissioners shall have the right to purchase or receive by donation any quantity of land, as will be to the interest of said territory, in erecting public buildings, and such other expenses as are incident to the same, and a majority of said board of commissioners shall have the right to fill vacancies should any occur in said board, until otherwise provided for by law.

"Sec. 4. Be it further enacted, That this act shall take effect from and after its passage."

It will be observed that said Menard County, or, as it was sometimes called, Menard District, was by such act denied *separate representation in Congress*, its representation in Congress to be, as theretofore, as part of Liberty County.

At that session of the Congress several counties were thus created, among them being Ward County. (Laws of Texas, Vol. 2, Gammel, p. 529.) The act creating Ward County is worded practically identically as is the above quoted act creating Menard County, and it, too, denies Ward County *separate representation in Congress*.

In the case of *Stockton v. Montgomery*, the Supreme Court of the Republic of Texas (Dallam's Decisions, p.

473), holds that the act creating Ward County was contrary to the Constitution of the Republic of Texas, for the reason that same was in conflict with Section 5, Article 1, of the Constitution of 1836, which provides:

“The House of Representatives shall not consist of less than twenty-four nor more than forty members, until the population shall amount to one hundred thousand souls, after which time the whole number of Representatives shall not be less than forty nor more than one hundred. *Provided, however, that each county shall be entitled to at least one Representative.*”

This was the sole ground upon which such act creating Ward County was held unconstitutional.

Mr. Dallam, who published the opinions of the Supreme Court for that period, makes the following notation at the end of the opinion:

“Opinion delivered by Judge Hutchinson, but nothing on record to show it was concurred in.”

A portion of this opinion, found on page 486, we quote:

“If the effect of the decision of this case should be to repudiate, as unconstitutional, the county of Ward, I am prepared to say from a principle of necessity, consonant with sound practical sense and distributive justice, however variant from an exquisite chain of sophistries that might be elaborated, *that all the judicial and ministerial action had in the territory under the seeming sanction of the Constitution and the forms of law, is precisely as valid de facto as if it could have received and had actually received full and separate representation in Congress.*”

There has been no Texas court decision throwing doubt upon the Menard records, only insofar as the opinion in the case referred to and quoted above does so, and it

will be observed that that opinion holds the Ward County records to be *de facto*.

But that is not all. Menard County was organized under the provisions of the Act of January 22, 1841, quoted, and the machinery of its government set in motion. James B. Arnett was selected as County Clerk or County Recorder, with whom deeds and other instruments were filed to be registered under the registration statutes in force; courts were organized; cases tried; executors and guardians appointed; estates settled; marriages solemnized and celebrated by officials, and under license issued by the officials of Menard County. Among the actions taken was the filing and the recording of the deed from Charles A. Felder to William A. Daniel, shown to be on such records at Vol. A, p. 119, and to have been filed February 23, 1842.

On January 6, 1844, the Congress of the Republic of Texas passed an act (Vol. 2, Gammel's Laws of Texas, pp. 919-922), pertaining to Liberty and Menard Counties, a part of which, pertinent to this discussion, we quote:

"Sec. 9. Be it further enacted, That all the acts of the Chief Justices of the Northern Division of Liberty, and the District of Menard of said County of Liberty, in the appointment of Executors, Executrix's, administrators or administratrix's, Guardians, and the granting of letters testamentary, and their settlements with the same, either final or partial, agreeable to the then existing laws of the Republic, as well as all the acts of the Executor, Executrix, administrator or administratrix, or guardians, agreeable and in conformity with said existing laws of the Republic, shall be valid and of binding effect, and in all cases where final settlement, by such persons, had not been made, it shall be the duty of such Executor, Executrix, administrator, administratrix or Guardian, to make settlement with the Chief Jus-

tice of Liberty County, and it shall be the duty of said Chief Justice, of said County, upon the application of such Executor, or Executrix, administrator or administratrix, for re-appointment, without good cause shown to the contrary, to make such re-appointment, upon their entering into bond and security, as the law directs.

“Sec. 10. Be it further enacted, That all marriages, solemnized under license from the Clerk of the County Court of said Northern Division, and Menard Districts, and celebrated by persons who were, otherwise, legally authorized to celebrate the rights of matrimony, but who had been elected or appointed, under the organization of said Districts, or such other person as was by law authorized to celebrate the rights of matrimony, shall be held to be of legal and binding effect, from the period when they were thus solemnized, and all the issue of such marriages are, hereby, declared to be legitimate.

“Sec. 11. Be it further enacted, That all deeds, and other instruments of writing, which have been duly proven before the proper officers of justice of such Districts, or other legal officers, and filed for record with the Clerk of the County Court of said Districts, shall have, from the time thus filed, the *same legal validity and effect* as if duly proven and recorded in the office of the Clerk of the County Court of Liberty County, saving, however, to judgment creditors and purchasers, without notice, all rights which they may have acquired before the passage of this act.

“Sec. 12. Be it further enacted, That the records of the County Court Clerk's office of said Districts be, by the former Clerk of the same, or such other person as may have them in possession, delivered over, upon oath, to the Clerk of the County Court of Liberty County, *to be kept by him at the places of holding the courts for said County, in the Districts in which said records were made.*

“Sec. 13. Be it further enacted, That all lands, or negroes, sold by virtue of any execution, or decree,

of any of the courts, holden for Liberty County, shall be sold at the place of holding the court from which said decree or execution issued."

Sections 2, 3, 4, 5, 6, 7 and 8 of said act direct the officials of Liberty County, including the judges of the courts, tax assessor, etc., to carry on the business of Menard County, and provide that cases originating in Menard County should be tried at a place of holding court in said Menard County, etc. Note that the requirement was that the Deed Records, etc., of Menard County should be kept by the Liberty County Clerk at the places of holding courts of said county in the district in which said records were made. In other words, the Menard records were not to be removed to the county seat of Liberty County, apparently, but were to be kept within the territory which formerly constituted Menard County.

By Act of the Congress of Texas approved April 3, 1846 (Act of 1846, p. 42, Gammel's Laws of Texas, Vol. 2, p. 48), Tyler County was created, comprising the same territory formerly included in Menard County, and the land in controversy in this case thereupon became a part of Tyler County.

Article 674 of the Revised Statutes of Texas of 1879, which provision, however, was the law by enactment of the Congress or Legislature of Texas previous to its incorporation in said statute, is as follows:

"Art. 674. Books, etc., shall be delivered to such officers. It shall be the duty of all officers of the county from which any new county has been created, or to which any such newly organized or reorganized county has been attached, and the duty also of all other persons who may have in their possession any books, records, maps or other property belonging to such newly organized or reorganized county, to deliver the same to the proper officers of such newly or

ganized or reorganized county within five days after such officers have been legally qualified as such, and any officer or person who shall willfully fail to make such delivery upon demand made therefor shall be guilty of a misdemeanor, and punished as provided in the penal code."

The Court of Civil Appeals of the Fourth District of Texas (San Antonio Court of Civil Appeals), in the case of *Hooks v. Colley* (53 S. W., 56), passed upon the question of who was the proper custodian of the Menard Records, and the admissibility in evidence of a certified copy therefrom made by the County Clerk of Tyler County, and used the following language:

"A certified copy of a deed from the original grantee, Cox, to David Brown, of date September 21, 1838, purporting to convey the land in question, and certified by the county clerk of Tyler County, was allowed in evidence, over objections of defendants. The question to be considered here is confined to what is raised in appellants' brief. There is but a single proposition presented to us by appellants on this subject, as follows: 'A certified copy of the record of a deed must emanate and come from the proper and legal custodian of that record; and the county clerk of Liberty County is the proper and legal custodian of the law records of the old judicial district or county of Menard.' It will be seen from this that the objection presented to us is that the copy was not admissible, because it should have been given by the county clerk of Liberty County. If this particular objection prove untenable—that is, if such clerk was not the legal custodian of such record—the assignment should not be sustained.

"Questions are discussed which to us appear immaterial to this particular question. The territory of Tyler County was detached from Liberty, and organized at an early date; and under Article 674, Rev. St., 1879, if not by force of previous legislation, it was the duty of the county clerk of Liberty County

to deliver any records he had pertaining to Tyler County to the county clerk of the latter county. The territory of Menard and of Tyler County was the same. *Any record relative to this territory was not intended to remain with the clerk of Liberty County, and such a record book or books as the Record of Deeds of Menard was properly deliverable to the clerk of Tyler County. It appears to have come into the latter's custody, and presumably this was by delivery from the clerk of Liberty, in the performance of this duty. Under this state of facts, it must, it seems to us, be held that the county clerk of Liberty County was not the proper custodian of such record in 1898, when the certified copy was issued. This is the only question we have to decide, as the matter is presented by appellants' proposition."*

The deed from Charles A. Felder to William A. Daniel, appearing upon such Menard records, and which was so admitted in evidence by the trial judge, is copied in full under our first specification of error.

What has been said, we believe, will demonstrate to your Honors, even before reaching the discussion of plaintiff in error's long active claim, that, beyond question, the issue of execution of the deed was one for the jury. And that the Menard County records, affecting property rights as they do to territory in Texas as large as the State of Delaware, and perhaps not only property rights but marital rights as well, and perhaps the legitimacy of children, are valid records of the State of Texas, and that the Honorable Circuit Court of Appeals was in error in its holdings regarding same.

But, turn aside from that question a moment, and consider it from the standpoint that such records are not, technically speaking, such as to comply with the statutory law of Texas, and we have the case of plaintiffs in error producing in court a deed from a record which

was supposed at the time the deed was recorded to be valid, and under which there has been long, open, active and consistent claim for seventy years.

As stated, plaintiffs in error offered in support and corroboration of said deed from Felder to Daniel appearing upon the Menard records, a long, consistent, open and active claim to the property in question, and showed the inactivity and dormancy of the claim of defendants in error under the purported junior deed from Felder to Veatch. To discuss this will necessitate an examination of the evidence.

Intervenors claim to be a part of the heirs and devisees of James Morgan, and offer in evidence:

(a) Deed from Charles A. Felder to John A. Veatch, dated June 18, 1839, purporting to convey the entire Charles A. Felder league. (Rec., p. 67.)

(b) Deed from John A. Veatch to James Morgan, dated March 15, 1841, purporting to convey the entire Felder league (4428 acres). (Rec., p. 73.)

(c) Will of James Morgan, in which George Ball, of Galveston County, Texas, and H. F. Gillette, of Harris County, Texas, and William N. H. Smith, of North Carolina, are appointed executors, and in which certain persons, including intervenors, are constituted residuary devisees (Rec., p. 210). Such persons are the grandchildren of James Morgan. This will was probated in Harris County, Texas, April 30, 1866. James Morgan died about that time.

Plaintiffs claim under the above mentioned purported deeds from Felder to Veatch and from Veatch to Morgan, and under the following chain of title:

(a) Deed from James Morgan to W. W. Swain, dated November 21, 1844, purporting to convey the *entire tract of land involved in this suit*. (Rec., p. 155.)

(b) Deed from William W. Swain to Robert Rose, dated January 5, 1846, purporting to convey *1721 acres of the land involved in this suit*. (Rec., p. 160.)

(c) Deed from Robert Rose to John N. Rose, dated August 4, 1854, purporting to convey the same *1721 acres of the land involved in this suit*. (Rec., p. 165.)

(d) Deed from John N. Rose to William M. Goodrich, dated January 12, 1871, purporting to convey the same *1721 acres* of the land involved in this suit. (Rec., p. 168.)

(e) Plaintiffs purport to be the devisees or heirs at law of said William M. Goodrich.

An examination of the foregoing instruments will disclose that if the deed from James Morgan to William W. Swain was in fact executed, *interveners*, who are the grandchildren and devisees of James Morgan, *cannot recover in this case under any possible theory, because all title was taken out of their ancestor James Morgan by said deed*. And interveners strenuously insist that no such deed was executed. Further, if such deed was executed, plaintiffs in this case, claiming under William M. Goodrich, can only recover 1721 acres of the land in controversy, because only title to said 1721 acres passed to said Goodrich, if any title passed. During the trial of the case, however, plaintiffs and interveners entered into an agreement, that any recovery by plaintiffs should inure to the benefit of interveners, and any recovery by interveners should inure to the benefit of plaintiffs. The trial judge peremptorily instructed a verdict (except as to the sole issue of five year statute of limitation submitted to

the jury) for the entire tract of land in controversy, 2578 acres, thereby finding and holding, without the assistance of a jury, that James Morgan never in fact parted with whatever title he acquired under the purported deeds from Felder to Veatch and Veatch to Morgan, above set forth. To uphold the judgment for the entire 2578 acres the holding must of necessity be that James Morgan never in fact executed the purported deed to W. W. Swain, above referred to.

What claim, then, does this record show that James Morgan made to the land in controversy? What did he do during his lifetime to dispute the title being asserted by petitioners' vendors under the deed from Felder to Daniel, which deed, as stated, was spread upon the Menard records as early as February 23, 1842? He lived until 1866. During that period deeds were placed of record from William Daniel to Thomas J. Word, one of the leading citizens of Texas (Rec., p. 345), and from Thomas J. Word to Judge George F. Moore, Chief Justice of the Supreme Court of Texas. (Rec., p. 374.) Both Word and Moore were actively claiming the land. During the time, they surveyed it out, and from time to time had tenants thereon. There is evidence of payment of certain taxes by them during said period. (Rec., pp. 323-330.) Whether the deed from Felder to Daniel, then appearing upon the public records, was or was not executed, could have been determined at any time during James Morgan's lifetime by an action brought by him for the land. During that time, the parties to the deed were probably all living, the witnesses thereto were probably all living, the officer taking the acknowledgment was probably living. Respondents likewise attack the deed from Daniel to Word. The identity of Daniel and the facts as to the

execution of that deed could have been known during the lifetime of Morgan. Morgan is said to be a Commodore in the Texas Navy, and, presumably, a man of affairs and in touch with his affairs, yet this record shows no action in court and no protest from Morgan over the assertion of title by the vendors of plaintiffs in error for this land. There is no rendition nor payment of taxes by Morgan shown. After the death of Morgan, his executors brought a suit for the entire Charles A. Felder league of land, which included the 2578 acres involved in this suit, against Judge George F. Moore, who was, as stated, Chief Justice of the Supreme Court of Texas. This suit was filed some time between 1866, when Morgan died, and 1872. It was in the nature of trespass to try title under the Texas statute, and was filed in the District Court of Hardin County, where the land is situated. It remained on the docket until *October 26, 1885*, when it court ordered that it be stricken from the docket *for want of prosecution*. (Record, pp. 330 and 331.) During the time it was on the docket, the depositions of Thomas J. Word were taken.

It will thus be seen that the executors of Morgan, charged with the duty of administering his estate and acting in a fiduciary capacity, and liable for any damages occasioned the owners of the estate by reason of neglect, allowed their suit for this land to be dismissed from the docket for want of prosecution—clearing indicating that they learned facts, which facts must have been known to Morgan, which convinced them that the title of George F. Moore, under whom plaintiffs in error claim, must prevail.

Whether James Morgan left any children surviving him does not clearly appear from the record. It may be that

the grandchildren mentioned in his will (some of whom are interveners herein) alone survived him. However that may be, there is no proof in this record that the children of James Morgan, nor the grandchildren of James Morgan, were any more diligent or any more active in the assertion of claim than was their father, James Morgan. And it was not until 1912, when this suit was filed, that interveners, grandchildren of Morgan, asserted any claim, so far as this record shows, to this land. And all of that time persons under whom plaintiffs in error claim were actively claiming same, paying taxes thereon, cutting timber therefrom from time to time, taking sand therefrom, and actively asserting title thereto. There is not only no explanation of why the executors dismissed their suit, but there is no explanation of why the interveners waited from 1866, which was the date of the death of Morgan, to 1912, to bring this suit. One significant fact is that during such wait (in 1874) the records of Liberty County, where the land was situated at the date of the deed from Felder to Daniel, and in which county such deed would naturally be recorded, were burned and destroyed.

Since, as pointed out, the trial judge must necessarily have found that the purported deed from James Morgan to W. W. Swain was not in fact executed, it would not seem to be necessary to point out the non-claim upon the part of W. M. Goodrich and *plaintiffs*, who claim under William M. Goodrich, and those under whom Goodrich claimed, but as such non-claim is so apparent from the record we will briefly do so.

As pointed out, it is claimed that James Morgan conveyed to W. W. Swain November 21, 1844. (Record, pp. 155-157.) Interveners strenuously insist that no such

deed was executed. But if in fact it was executed, note particularly that it conveys only "all his (Morgan's) right, title, and interest" in and to the land in controversy herein. Note, too, that there is no warranty, but the concluding paragraph of the deed (Rec., p. 157) indicates only an intention on the part of Morgan to relinquish all his right, title and interest. Likewise, the deed from W. W. Swain to Robert Rose, dated January 5, 1846 (Rec., pp. 160-161), and conveying 1721 acres of the land in controversy, conveys only "all my right, title, interest and claim," and the warranty is a special warranty against Swain and those claiming under him. The deed from Robert Rose to John N. Rose, dated August 4, 1854 (Rec., pp. 165-166), conveys "all my right, title, interest," etc., in 1721 acres of the land in question, contains no clause of warranty, and specially stipulates that it is conveyed free from the claims of any person holding under the said Robert Rose. The deed from John N. Rose to William M. Goodrich, dated January 12, 1871 (Rec., p. 169), is likewise a quit-claim deed, conveying "all my right, title, and claim," without warranty, and the last paragraph indicates that said John N. Rose is conveying only his interest as against himself and those claiming under him. These persons were in much better position to know whether the deed from Felder to Daniel is a forgery than any person can be now. These conveyances were made at a time when all the parties, witnesses, and officers concerned in executing the deed, were probably living, and no explanation is offered in this record of why their conveyances were by quit-claim deeds rather than by general warranty deeds. The only explanation is that they knew that the superior title was in those under whom petitioners claim. William M. Goodrich lived ten years

(from 1871 to 1881) after he took the deed from John N. Rose. Plaintiffs, who are his heirs, took title upon his death. There is no evidence of any active claim by either Goodrich or his heirs. There is no evidence of any protest over the active claim being asserted under the chain of title under which plaintiffs in error hold. From 1881 down to the filing of this suit in 1911, a period of thirty years, and which was the period during which plaintiffs in error's claim was the most active, no word of protest is heard from plaintiffs (Goodrich heirs), no suit is filed, and no effort made to recover that which they *now* claim—after the destruction of the Liberty County records in 1874, and after the death of witnesses, parties, and officers concerned in the execution of the deed from Felder to Daniel. The record shows no evidence of any active claim or acts of ownership by either Swain, Robert Rose, or John N. Rose, save and except the execution of the quit-claim deeds above mentioned.

Plaintiffs in error's chain of title is as follows:

(a) General warranty deed from Charles A. Felder to William A. Daniel. (Rec., pp. 340-341.)

(b) Special warranty deed from William A. Daniel to Thomas J. Word. (Rec., pp. 345-347.) The explanation of why this deed is a special warranty deed is found in the depositions of said Word himself. (Rec., pp. 324-325.) He there details that he purchased, about 1850, from Mary E. Frazier, the daughter of David Brown, a number of leagues of land in Texas, including the Charles A. Felder survey. He says (Rec., p. 325):

"I found also that several other persons had deeds on record for said league. R. O. Lusk had a deed for that league and others that I had bought as stated above. Also W. A. Daniels, but they claimed to hold the same as trustee for said David Brown. * * *"

Also general warranty deed from Mary E. Frazier (daughter of David Brown) and husband to Thomas J. Word, dated January 19, 1855. (Rec., p. 356.)

Naturally, if William A. Daniel held as trustee for David Brown, the real owner, when he came to convey to T. J. Word, the purchaser from the daughter of David Brown, he would only give a special warranty deed.

(c) General warranty deed from Thomas J. Word to George F. Moore, dated December 8, 1858, reciting consideration of \$20,000, and conveying among other lands an undivided half interest in the Charles A. Felder league. (Rec., p. 374.)

(d) Partition deed from Thomas J. Word to Susan Moore (wife of George F. Moore), being special warranty in its nature, dated July 5, 1866, the consideration being previous conveyance of other property to Word. This deed conveys to Susan Moore Word's half interest in the Charles A. Felder league. (Rec., p. 374.)

(e) General warranty deed from George F. Moore and wife Susan Moore to John P. Irvin, dated August 4, 1881, conveying the Felder league and other lands, the consideration being \$30,807. (Rec., p. 375.)

(f) General warranty deed from E. A. Irvin to John P. Irvin, dated December 26, 1889, conveying the Charles A. Felder league and other lands, the consideration being \$57,782. (Rec., p. 375.) John P. Irvin had theretofore conveyed this league to E. A. Irvin.

(g) General warranty deed from John P. Irvin to the Texas Pine Land Association, dated December 11, 1891, conveying the Charles A. Felder league and sixteen other tracts of land. (Rec., p. 375.)

(h) General warranty deed from the Texas Pine Land Association to the Houston Oil Company of Texas, dated

July 31, 1901, conveying the Charles A. Felder league. (Rec., p. 381.)

It will be observed, therefore, that as distinguished from the chain of title under which defendants in error claim, the chain of title of plaintiffs in error is in the main composed of general warranty deeds, including a general warranty deed from Thomas J. Word and from Judge George F. Moore, Chief Justice of the Supreme Court of Texas. All these instruments were recorded soon after their execution.

Defendants in error, as stated, deny the execution of the deed from William A. Daniel to Thomas J. Word. However, the trial court admitted in evidence certified copy of the deed (Rec., pp. 345-348), with no objections from defendants in error except the statement that the deed was signed "William Daniels" and not "William A. Daniel," to which the trial judge replied that the exact facts were that in the body of the deed the grantor is recited as being a man called William A. Daniel, and the signature shows William Daniels, by his mark. No exceptions were saved by defendants in error. It is true that Dock Owens (Rec., pp. 677-680), a witness for defendants in error, and a resident of South Carolina, who had never lived in Texas, testified by deposition to having known a man by the name of William A. Daniels, who went to Texas, and who, he says, died "somewhere in the West" about 1849 or 1850. This, if true, clearly refers to another Daniel or Daniels. But when you consider the depositions of Thomas J. Word—against whom no breath of suspicion has ever been uttered—the deed from Daniel to Word, if more than the certified copy admitted in evidence is needed, is clearly established.

We quote from Word's testimony as to his purchase of

the property in 1850, and as to his claim and use of the property from 1850 to 1866, and also show by the following quotations from, and references to, the Record, that the claim of plaintiffs in error and their vendors is not evidenced simply by the execution of the deeds above referred to, but also by other continuous acts of ownership.

Acts of Ownership, 1850 to 1866.

T. J. Word testified (Rec., p. 322) :

“I became acquainted with the locality of the Charles A. Felder league of land in the latter part of the year 1854, in the month of November of that year. The circumstances that induced me to become acquainted with the locality of said league are these: On or about the 31st day of October, 1850, I then being a citizen of Mississippi, I met with Mary E. Brown, the daughter and only heir of David Brown, deceased, at her uncle's, John Smith, in Pontotoc County, Mississippi, and being induced by the said Smith, I joined him in the purchase from the said Mary E. Brown of her interest, real and personal, in the estate of her father, David Brown. In this purchase the Charles A. Felder league was included. In the fall of 1854, I employed surveyor A. N. B. Thompkins, and hired hands, and accompanied them in person to hunt up and survey the lands, thus purchased of Miss Brown. She having before that date intermarried with W. B. Frazier of Sabine or San Augustine. Thompkins commenced surveying at or near King Ratcliff's, about ten miles below Town Bluff, on the Neches river, and continued down the river, surveying the leagues, and about the latter part of the month of November, 1854, we ended our work, and the Charles A. Felder league was the last league we designated and mapped. These are the circumstances which induced me and the means used to acquire a knowledge of the said league and its location.

“I did, as above stated, assert a claim to the said league of land, together with several other leagues,

and I purchased in connection with John Smith, as above stated, from Mary E. Brown, now Mary E. Frazier. The purchase was made on 31st October, 1850, at and for the sum of six thousand dollars, all of which sum I paid myself to the said Mary E. Brown, now Mary E. Frazier. And in the division of the lands between said Smith and myself the Felder league fell to me. When we were surveying out said lands, as stated above, we found some parties of the name, I think, of Hare, claiming some right to the ferry on the Big Alabama or Village Creek, but they relinquished their claim to me, and I leased the ferry to them; subsequently one of the Ratcliffs managed and controlled the ferry, but set up no claim to the land, and recognized me as the owner, and so with all the occupants of the place so far as I know up to the time I sold it. I found also that several other persons had deeds on record for said league. R. O. Lusk had a deed for that league and others that I had bought as stated above. Also W. A. Daniels, but they claimed to hold the same as trustee for said David Brown, and I took deeds from them from Lusk on 5th Oct., 1855, and from Daniel on 5th February, 1855, for that league and others so held by them; some others also seemed to have some sort of claim. But all so far as met with them conveyed to me; this is so far as I can recollect in answer to the third interrogatory.

"From the time I first purchased the land in 1850 up to the time I had the (land) identified and placed on the map in 1854, John Smith had the oversight of them. From November, 1854, up to the 4th July, 1866, when Mrs. Moore and myself divided and partitioned our lands, all the lands were under my supervision and management. I visited them almost every year, and sometimes two or three times, kept tenants on them, etc., first on my own account, and then for Mrs. Moore and myself, up to the division.

"When, in November, 1854, I first was on the Felder league there, two young men whose names I think was Hare, on said league at the ferry, and were preparing, as they said, to put in a new ferry boat; they

said they thought the land was vacant, and intended to put a preemption claim on it. Myself and Smith leased it to them for five years, I think, but they soon abandoned it. There was another man by the name of Massey living on or near it, between the ferry and Weiss' Bluff, his house, I think, was on the Montgomery league, but he had surveyed about 320 acres as a preemption.

"And a part of the survey ran over the Felder league. I purchased his right to this survey and preemption claim, and leased to him."

This lease is dated November 27, 1854, is signed by Asa Massey, witnessed by R. K. Ratcliff et al., and is found Rec., p. 592.

Continuing, T. J. Word testifies:

"W. Forbs also had a preemption survey mostly on the Montgomery league, but ran over on the Felder league, his house and tenth field was on the Montgomery league, and his survey running over on the other. I purchased his preemption claim and leased to him for five years. He resided on the place up to the time he moved to Hardin, the county seat, say, some four or five years. I also gave Mr. Callaway the right to cut some timber off the Felder and Montgomery leagues, in consideration that he would superintend them and keep off intruders, etc.

"I have answered the substance of this interrogatory in my preceding answers, but I will state farther that there never was at any time from the time I first saw said league of land, up to the time I sold it, and divided with Mrs. Moore, any person on said league of land, except those above stated, Massey, the Hares, and Forbs, living on said league, and none that ever lived on it claimed it or set up any title adverse to mine."

Word conveyed an undivided one-half interest to George F. Moore, Chief Justice of the Supreme Court of Texas. (Rec., p. 374.)

Continuing, Word says:

"I sold an undivided half interest in the Felder league and several other leagues to George F. Moore, on or about the 6th November, 1857, the consideration for all was about eighteen thousand dollars, which he paid me. Subsequently, he directed me to make deed for the same to his wife, Mrs. Susan Moore, which I did, and afterwards, about the 4th July, 1866, upon a division of our lands, I conveyed the Felder league with others to Mrs. Susan Moore in consideration that she conveyed to me other lands, so we divided, and this league fell to her."

Payment of Taxes, 1839 to 1866.

T. J. Word further testifies:

"From 1854 to 1866 I gave in said league of land for the assessment, and paid the taxes regularly, every year prior to that time, I think, in the year 1848, or 1849; this league, together with others, had been sold for the taxes as the *property of David Brown*, and bought in by the State. And in 1857 I redeemed the said league of land from the State by paying the taxes then due, and took the comptroller's receipt, and had it recorded. And so far as I can recollect, the above and foregoing answers embrace all I know about the matters referred to; much time has elapsed, and some things may have slipped my memory, but from memoranda made at the time for the purpose of keeping the matters in my mind, I have stated all."

The deed from Daniel to Word was admitted in evidence. (Rec., p. 345.) Likewise deed from Lusk to Word. (Rec., p. 357.) Also the general warranty deed from Word to Judge George F. Moore (Rec., p. 374), reciting consideration for this and other lands of \$20,000, and conveying a *one-half interest*. The partition deed between Word and George F. Moore and wife was also admitted in evidence. (Rec., p. 374.)

Acts of Ownership, 1866 to 1881.

Judge Moore, of the Texas Supreme Court, vendee of Word, and his wife, Susan Moore, was represented in Hardin County by P. S. Watts (power of attorney, Rec., p. 612), who was authorized to look after the Felder league and other property, and to

“* * * sell and dispose of the timber growing upon said land, upon such terms as he may think to the interest of my said wife, and for me and in my name to demand and receive the rents which may be due, or damages to which myself and wife may be justly entitled from occupants or trespassers upon any of said land; it being understood, however, that no rents are to be demanded from such parties as went into possession and have held possession under title and authority of Colonel Thomas J. Word, of Anderson County, or myself and wife, or under transfers of the possession or in right of occupancy derived from parties who went into possession as aforesaid, provided they will now make a written acknowledgment and renewal of occupancy under the title of my said wife, and I do by these presents authorize my said attorney to make new leases of said parts and parcels of the same as in his judgment may be reasonable and right.”

Elias K. Ward testified (Rec., p. 599):

That he is 56 years old, and was born and raised in Hardin County. Knows the Felder league since he can recollect, and was raised on it and worked on it since he was a boy. (Rec., pp. 599-600.) That the station Fletcher is on the Felder league. (Rec., p. 602.)

“Q. Did you ever know an old lady, I don't know whether a widow or not, named Mrs. Elizabeth Browning? A. Yes, sir; I was well acquainted with her.

“Q. Where did she live? A. In the same house Chester lived in; she lived with him.

"Q. There at the place known as Fletcher? A. Yes, sir.

"Q. I will ask you whether or not a man named Judge Watts ever came down there to interview Mrs. Browning in reference to her possession there and cutting timber? A. Yes, sir; I remember that P. S. Watts came down there while I was working there.

"Q. Who did he claim to represent? A. Susan Moore.

"Q. Anybody else? A. No, sir; but I think it was land owned by Word and Moore at the start. I think his rights were from Susan Moore; he was employed by Susan Moore." (Rec., pp. 611 and 612.)

Acts of Ownership, 1881 to 1891.

John P. Irvin testified (Rec., pp. 376-377):

"I have personal knowledge of the Charles A. Felder league in Hardin County, Texas. Have been on it frequently from 1880 to 1890.

"I have a business transaction concerning this survey, buying the same from George F. and Susan Moore, of Austin, Texas, and conveying the same later.

"The conveyance from George F. Moore and Susan Moore was a *bona fide* sale. I purchased the property for its timber value. The sum of money paid George F. and Susan Moore was, I think, the same as consideration in the deed, \$30,807.00."

John P. Irvin conveyed to E. A. Irvin, May 5, 1882.

John P. Irvin, continuing, says (Rec., pp. 377-378):

"I sold this property as indicated by said records to E. A. Irvin.

"It was a *bona fide* sale, and for the timber value. In the deal with E. A. Irvin there was included besides the Moore lands, other lands, ten to fifteen thousand acres. The whole consideration was from \$55,000.00 to \$60,000.00. E. A. Irvin furnished the money in cash, and the title was in him. I had a contract from him for a half interest in the same, and

some years after, as the records will show, I bought him out entirely."

Irvin, in answer to cross-interrogatory No. 5, says (Rec., p. 380):

"Consideration paid in cash and in time to meet and cover my obligations for the Moore and other lands conveyed to E. A. Irvin; the transaction was completed in a comparatively short time; and as I mentioned before, E. A. Irvin advanced the money, \$55,000 to \$60,000; and upon my conveying the lands to him, entered into a contract with me by which I had a half interest in the same or in the profits of the same, if operated or sold. Later, some years after, I bought him out bodily of all his interest in Texas. The cash consideration in the deed from myself and wife to E. A. Irvin was \$46,000; this includes the 41,076 acres bought from Moore and wife, August 4, 1881, and also other leagues purchased by me later from the heirs of T. J. Word. The deeds of record will show all these transactions correctly. I may have been mistaken in mentioning the consideration, \$55,000 to \$60,000, through including in my mind other lands, taxes and expenses in my business with E. A. Irvin; but the deeds and records are correct, and will show the facts."

E. A. Irvin conveys to John P. Irvin (Rec., p. 375) by "general warranty deed dated December 26, 1889, filed for record in Hardin County, December 26, 1889, and recorded in Book P, pp. 229 to 231, recites a consideration of \$57,872.72, and conveys other land as well as the Felder league."

A. B. Doucette, of Beaumont, says (Rec., pp. 382 to 385):

"Q. Did you represent John P. Irvin as agent or otherwise? A. I became an employe of John P. Irvin in February, 1885. I took the business held by J. J. Copley previous to that."

"Q. What were your duties? A. Well, just to keep the lines open, keep off trespassers off of the land, lease to squatters, if any, sell enough timber to pay the taxes and expenses every year.

"John P. Irvin sold the timber off of the Felder to a man by the name of Perry Sacher, but he lived on the D. C. Montgomery league. This was his place of residence.

"I can remember that Sacher is one man I know of who cut off the Felder and put in timber in about forty different places during five or six years.

"I paid the taxes for Irvin from 1885 until 1894, until it was sold to the Texas Pine Land Association, during that time I think E. A. Irvin probably paid part of the taxes in Tyler County, Jasper and Sabine County, Texas. But I bought all of the necessary scrip that could be bought in that kind of money for Irvin in five counties, Hardin, Jasper, Sabine and Angelina, of course, the Felder being amongst the several leagues in Hardin County; the taxes were paid in bulk as nearly as practicable.

"Q. Were they paid each year they accrued, or not? A. Yes, they were.

"Q. Who was on that land when you took charge for John P. Irvin besides the family at the ferry? A. That was all the people I knew.

"Q. Was anybody on it at the time you took charge of the timber you sold to the Texas Pine Land Association? A. No, there was some young men on the league around the creek during fishing season and in the winter time, they did some trapping in there. Everybody could fish all they wanted to on the creeks.

"Q. Do you know who claimed to be the owner of that league from the time you took the business for John P. Irvin up to the present time; whether they claimed it open or not? A. Irvin bought from Judge Moore and Word at Austin.

"Q. Now, except Judge Moore, John P. Irvin and Word, Texas Pine Land Association and Houston Oil Company of Texas, who, if anyone, within your knowledge, has asserted ownership or title? A. No

one that I know of except Frank Womack; he set up title to about six hundred and forty acres which lay about three-fourths of a mile east of Cane's Ferry.

"Q. He was sued by the Texas Pine Land Association and defeated, was he not? A. During my time he tried to hold some timber there, but Mr. Irvin stopped him. I would not say whether any compromise was made with him or not.

"Q. Womack, at the time this controversy came up, lived at the ferry, did he? A. He lived at Pine Island, just now known as the town of Voth.

"Q. How far is that from this league? A. It is six or eight miles south of the league.

"Q. Then Womack did not succeed with his claim? A. Not so far as I know.

"Q. What year was it he set up that claim, do you recollect? A. I think it was about 1887 or 1888."

The Irvins (Rec., p. 375) conveyed to the Texas Pine Land Association by general warranty deed the Felder league and sixteen other tracts for \$334,220, December 11, 1891, duly recorded.

Acts of Ownership, 1891 to Filing Suit.

John H. Kirby testified (Rec., pp. 253 to 288):

That he was vice-president and general manager of the G. B. & K. C. Railroad prior to 1900; that the stock of same was sold to the Santa Fe (G. C. & S. F. R. R.) in 1900, and the road afterwards merged into the Santa Fe system.

(The Santa Fe was permitted to absorb same by act of the legislature of March 30, 1903, Act 1903, p. 252.)

That he was also Texas representative of the Texas Pine Land Association, which association claimed the land in controversy from the time of its purchase from

Irvin in 1891 to its sale to the Houston Oil Company of Texas in 1901.

That the G. B. & K. C. R. R. was built north out of Beaumont in 1893, and crossed Village Creek at a point on the land in controversy in the fall of 1893. That said railroad was built on to the Felder league by, and with the permission of the Texas Pine Land Association. That immediately a sand pit or mine was established on the land in controversy at a point on Village Creek known as Fletcher or Village, and sometimes referred to as Sand Pit F, under a contract between said railroad and the Texas Pine Land Association and sand mined continuously, to *his* knowledge, up to the time of the sale of the railroad to the Santa Fe, in 1900. The railroad paid the Pine Land Association so much per car for the sand, it being loaded part of the time by employes of the association, and part of the time by the railroad. As to the quantity of sand taken, we quote his testimony (Rec., p. 257):

“Questioned by Judge Kennerly:

“Q. You say after you had taken the sand off the right-of-way, you made arrangements with the Texas Pine Land Association. How long did it take to get the sand off the right-of-way? A. *Two or three months. We had a gumbo district this side of Pine Island Bayou, and put enough sand there to fill the Neches River.*

“Q. Where did you get the sand? A. *From sand pit at Village Creek.*

“Q. That was used to ballast the track from Beaumont north? A. *Yes, sir, and some beyond the sand pit, and we used it to fill the yards here in Beaumont out beyond Calder Avenue.*

“Q. Do you mean by the yards the place the trains stopped? A. *No, sir, we had machine shops and general yards out there for switching purposes.*

“Q. I will ask you whether or not the G. B. & K. C. also sold sand for commercial purposes? A.

Well, I don't remember exactly; I was not here all the time. *Commercial sand was moving all the time, but whether the railroad sold it or the Texas Pine Land Association, I don't know.*"

That he saw the sand pit daily when he was in Texas, and knew of its continuous operation during the period named. That payments were made each and every month by the railroad company to the Pine Land Association for sand. That houses were built by the Pine Land Association for the use of the employes engaged in moving sand, and were occupied by them.

J. E. Withers testified (Rec., pp. 458-474):

That he went to work for the G. B. & K. C. R. R. as a brakeman and all-around man, January 10, 1894. That he had known the property at Fletcher and the sand pit in question since January 14, 1894. That he has worked for the G. B. & K. C. Railroad and the Santa Fe Railroad continuously since that time. That prior to 1895 he was handy-man for these companies, and since 1895 he has been conductor, and mostly passenger conductor. *That he has passed the sand pit every day for at least ten months in each year since 1895.*

Questioned as to whether as much as a month elapsed when sand was not being taken, he said:

"Q. What is your best recollection as to whether it was as much as a month? A. *My idea is that there never was as much as a month that sand was not taken out, but I would not swear to it, because we used sand for different purposes.*

"Q. What I want is your recollection about it. A. *I know we got sand out of there, and the Texas Pine Land Association got sand out of there, and that people got sand out of there for different things. They got sand from there to build mills and furnaces and brick work.*

"Q. Did the Texas Pine Land Association get sand there all the time? A. Yes, sir; I guess so.

"Q. Then the G. B. & K. C. got sand for their engines and to ballast the track, and for what other purposes? A. That is about all, for the roundhouse and track ballast.

"Q. That continued from 1895 up to 1902? A. Yes, sir. And from 1902 to now."

To the same effect was the testimony of T. E. Danziger (Rec., p. 239); R. E. Wall (Rec., 291); W. W. Willson (Rec., p. 436); W. T. Hooker (Rec., p. 474); A. L. Harris (Rec., p. 481); Mrs. L. Mattingly (Rec., p. 519); Joe Bumstead (Rec., p. 565); W. T. Carroll (Rec., p. 685).

It is also shown by these witnesses that some person or persons were residing in the houses on this property practically continuously.

It is undisputed that during the time this property was held by the Texas Pine Land Association all these operations were by it or with its consent.

In 1902, after the sale of the property by the Pine Land Association to the Houston Oil Company of Texas, a contract was made by the oil company with the Texas Builders Supply Company, by which the latter company mined sand from said property, and a record was kept of the number of cars (Rec., pp. 242-247) of sand mined therefrom, and payments were made therefor to the oil company. *It was shown that there were from two to sixty cars per month removed from October, 1902, up to the filing of the suit, or a total of 2742 cars. By figuring the size of the excavation, it was shown that approximately 6000 cars were removed from the opening of the pit in 1893 to October, 1902 (Rec., p. 242), or 86,600 cubic yards of sand during the entire period.*

In addition to the sand pit, it was shown by the wit-

nesses named that the Pine Land Association had numerous tie camps, for the manufacture of railroad ties from the timber on said property, some of which remained for several years. Residing therein at times were numerous families. Also that for a long period the Pine Land Association maintained a wood yard on said property from which wood was supplied to the said railroad company, said wood being taken from the property in controversy. It was also shown that much timber was cut from time to time by the oil company and those claiming under it. It was not shown that said railroad company had either, by condemnation or purchase, acquired right-of-way across the land in controversy, and it was shown that its entry was by consent of the Pine Land Association, and its continuous operation by consent of that association and its successor, the Houston Oil Company of Texas. It was also shown that said railroad in 1893 established a water tank and pumping plant on said property, which has been in continuous operation since, its employes who operated same residing on the property in controversy. Such employes most of the time resided some distance from the track, and not on what would ordinarily have been the railroad right-of-way.

It was shown that all taxes were paid by the Pine Land Association and by the oil company during the period each held said property, and down to the filing of the suit, and since.

Among the vast number of witnesses who testified as shown by this record, many being engaged in these extensive operations carried on by the Pine Land Association and the oil company and their vendors, not one could be found who had ever heard of any claim asserted by

defendants in error or those under whom they claim, or who had ever been interfered with in their use and enjoyment of this property.

Second Specification of Error, that the Trial Court Erred in Excluding Certified Copy of Deed from Felder to Daniel:

The complaint is that plaintiffs in error were entitled to the benefit of having certified copy of this deed in evidence as a muniment of title. Had it been so admitted, it with the circumstances hereinbefore detailed, of the long, active claim thereunder, would have justified the trial judge under the Texas authorities in finding that such deed was in fact executed. This was the view of the trial judge, note his suggestions (Rec., p. 361):

"The Court: The question presented is one that everybody connected with the case ought to give careful attention to, because it is a vital question in the case. If I should err in the admission of the testimony now, of course, it would be such error as would be vital to the judgment in the case. If the instrument is admissible, and I exclude it, I think it would be a fatal error, and if it is not admissible, it would be error to let it in. Therefore, I have been glad to hear the discussion," etc.

But, aside from the effect in this case, the broader view is presented that the property interests situated in the former County of Menard are, and will be, seriously affected by the erroneous ruling of the lower courts, particularly of the Honorable Circuit Court of Appeals.

The first objection of defendants in error to the admission in evidence of certified copy is that proper search has not been made for the original deed from Felder to

Daniel. We do not understand that this objection was sustained by the trial court. Certainly, sufficient search was shown. (Rec., pp. 308, 313, 315, 332.)

The second objection is that the certified copy of the deed was certified by the Clerk of the County Court of *Tyler* County, and that it should be certified by the Clerk of the County Court of *Liberty* County. In other words, the claim is that the Clerk of the County Court of *Liberty* County is the proper custodian of the records, instead of the Clerk of the County Court of *Tyler* County. We do not understand that this objection was sustained by the trial judge. Certainly, under the authority of the case of *Hooks v. Colley*, already cited (53 S. W., 56), and under Article 674 of the Revised Statutes of 1879, already quoted, there is no merit in this contention, and it is clear that the Clerk of the County Court of *Tyler* County is the proper custodian of the *Menard* County records.

The third objection is that the deed was not acknowledged before any officer, in that it is claimed that William Myers, the authenticating officer, was not a notary public at the time he took such acknowledgment. The sole and only proof offered that William Myers was not a notary public at the time he took the acknowledgment is what purports to be a list of the civil officers of *Jasper* County, Texas, for the years 1839 to 1842, inclusive, taken from the office of the Secretary of State of the State of Texas. (Rec., 366 to 370.)

This was admitted over the objections of plaintiffs in error, to aid the trial judge in taking *judicial knowledge* that said William Myers was not such notary public on June 10, 1839. At the outset, we are filing with this brief, and attaching a copy as Appendix A to the printed brief, a certificate, likewise from the office of the Secretary of

State of the State of Texas, which affirmatively shows that there was a William Myers who was appointed notary public of Jasper County on May 13, 1839, about a month before the date of the deed and acknowledgment in question. Said certificate is filed in this court to aid the judicial knowledge of this court that said William Myers *was* such notary public at the time of the execution of the deed in question. Further explanatory of this matter, counsel state that the list filed by defendants in error in the trial court, and appearing in the Record as above referred to, in fact appears as given upon the old record book in the office of the Secretary of State of the State of Texas; but that counsel for plaintiffs in error discovered, long after the trial of this case in the trial court and long after the decision of the Circuit Court of Appeals, that the list of *notaries public* was in a different part of said book, and that such list of notaries public showed the name of William Myers thereon, as certified by the Secretary of State in the certificate filed with this brief. We believe that this court, under the circumstances as detailed, will, aided by the certificate filed herewith, take judicial knowledge that William Myers was such notary public at the date of said deed, it clearly appearing that the trial judge was inadvertently furnished by defendants in error with an incorrect list upon which to base his judicial knowledge. We assume that under the circumstances counsel for defendants in error will interpose no objections to this court's considering the correct list filed herewith.

If your Honors hold that such correct certificate will be taken as a basis for judicial knowledge that William Myers was such officer, then, we take it that a reversal of this case must necessarily follow, because the fourth

contention of defendants in error—that a notary public on June 10, 1839, was not authorized to take such an acknowledgment in Texas—is clearly met by the validating acts hereinafter pointed out.

But, if your Honors cannot, under the law, consider the correct certificate filed with this brief, showing that William Myers was a notary public at the date he took the acknowledgment to the deed, then we ask a careful and critical examination and analysis of the list which appears in the Record. (Rec., pp. 366-369.)

It will be presumed that Wm. Myers was a notary public. This question, we take it, may be regarded as settled by decisions of this court.

Bank v. Dandridge, 12 Wheaton, 64.

Keeley v. Sanders, 99 U. S., 441.

The question is also settled by the Texas authorities:

McKissick v. Colquhoun, 18 Tex., 145.

Deen v. Wills, 21 Tex., 648.

Cannon v. Cannon, 66 Tex., 682; 3 S. W., 38.

It is also held in Texas that the act of an officer taking an acknowledgment to a deed is regarded as a quasi judicial act:

Association v. Heady, 50 S. W., 1079; 57 S. W., 583.

Johnson v. Taylor, 60 Tex., 360.

We start, then, with the presumption—and the presumption is a strong one by reason of the long lapse of time and the active claim under the deed in question, and the long record of that deed upon the public records of the county—that William Myers was a notary public.

What, then, must be the weight of evidence to overcome this presumption? We submit that it must have the same weight that would be required to show that a judg-

ment rendered at that date was in fact rendered by a person not authorized to do so, etc. In other words, the evidence offered to rebut the presumption that William Myers was a notary public in Jasper County at the date of said deed must be affirmative and exclusive evidence, and must negative every fact and circumstance under which he might have been such officer. Does the list from the office of the Secretary of State do this? Clearly not. This list does not purport to cover any period prior to January 1, 1839, so that officers appointed prior to January 1, 1839, and whose terms of office had not then expired, would, of course, not be included therein. The Act of May 15, 1838, in force at the time this acknowledgment was taken (Laws of 1838, p. 10, Gammel's Laws of Texas, Vol. 1, p. 1480), is as follows:

“Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That there shall be appointed for the county where the seat of government is or shall be located two notaries public, in addition to the chief justice of said county; *and, also, one additional notary in each county of the Republic*, which appointments shall be made by the President, by and with the advice and consent of the Senate.”

If, therefore, William Myers, who took this acknowledgment, had been appointed by the President of Texas prior to January 1, 1839, his name would not appear upon the list. The fact that the name of William Myers appears upon the list as a District Clerk proves nothing. There may have been two or more men by that name.

Section 1 of the Act of December 20, 1836, provides for the selection in each county by the Justices of the Peace of such county of two of their number who shall be As-

sociate Justices of the County Court. This list shows that there was a William Myers appointed Justice of the Peace, February 4, 1839. It further states that he resigned as Justice of the Peace, but when he resigned is not shown.

The Act of June 12, 1837 (Acts of 1837, page 273, Gammel's Laws of Texas, Vol. I, page 1333), is as follows:

“Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That in cases in which the chief justice of the County Courts may be interested, and in case of the absence or inability of the chief justices to act, the associate justices of the County Court shall be authorized to act as judges of probate; *and either of the said associate justices may act as notary public in such cases, and during such period.*”

If the William Myers who qualified as Justice of the Peace on February 4, 1839, was elected by his fellow Justices of the Peace as Associate Justice of Jasper County, he was authorized, in case of the absence or inability of the Chief Justice, or in cases where the Chief Justice was interested, to perform the duties of notary public. Careful study of the list shown in the Record will bring to mind numerous similar situations, but these two are mentioned to show that this list does not meet the presumption which obtains, that said Myers was such notary public by reason of his so acting. Will a deed which has been upon the public records for more than seventy years, and which is just now attacked, and under which valuable property rights are held, be stricken down upon so flimsy evidence?

If not a *de jure* officer, William Myers was a *de facto* officer, and it is settled beyond question in Texas that a *de facto* officer may take an acknowledgment.

Thompson v. Johnson, 84 Tex., 548; 19 S. W., 782.⁴

But, whether Myers was a *de facto* officer or a *de jure* officer, and if he was neither, the deed and its record and his act were validated by the validating acts of 1841, 1860, and 1907, which we now quote.

Section 20 of the Act of February 5, 1841 (Laws of 1841, page 168, Gammel's Laws of Texas, Vol. 2, page 632), is as follows:

"Be it further enacted, That any grant, deed or instrument for the conveyance of real estate, or personal, or both, or for the settlement thereof in marriage, or separate property or conveyance of the same in mortgage, on trust to uses, or on conditions, as well as any and every other deed or instrument required, or permitted by law to be registered, and which shall have been heretofore registered, shall, *from the passage of this act, be held to have been duly registered, with the full effects and consequences of the existing laws; provided, the same shall have been acknowledged by the grantor or grantors, maker or makers, before any chief justice of the County Court, or before any notary public, or before the Clerk of the County Court, in whose office such record is proposed to be made, or proved before such officer by one or more of the subscribing witnesses, and certified by such officer; any obscurity or conflict in the existing laws to the contrary notwithstanding.*"

Sections 2 and 3 of the Act of February 9, 1860 (page 75 of the Act of 1860, Gammel's Laws of Texas, Vol. 4, page 1437), is as follows:

"That any grant, deed or other instrument of writing for the conveyance of real estate or personal

property, or both, or for the settlement thereof in marriage, or separate property, or conveyance of the same in mortgage, or trust to uses, or on conditions, as well as any and every other deed or instrument required or permitted by law to be registered, and which *shall have been heretofore registered or recorded, shall be held to have been lawfully registered*, with the full effect and consequences of existing laws. Provided, the same shall have been acknowledged by the grantor or grantors before any chief justice or associate justices or clerk of the County Court, or notary public in any county within the late Republic, or the now State of Texas, or judge of the department of Brazos, or any primary judge or judge of the first instance of 1835 or 1836, or proven before any such officer, by one or more of the subscribing witnesses thereto, and certified by such officer, whether such acknowledgment or proof shall have been made before any such officer of the county where such instrument should have been recorded or not.

“SEC. 3. That all such instruments which shall have been acknowledged or proven before any officer named in the foregoing section of this act, and which shall have been afterwards recorded in the proper county, or certified copies thereof, shall be evidence in the courts of the State, as full and sufficient as if such acknowledgment had been taken, or proof made in accordance with existing laws. This act shall not be so construed as to affect or bind in any manner any person or party with constructive notice of the existence of any deed, or other instrument of writing, as a recorded deed or instrument, except in the future, and after the taking effect of this act, unless such person or party would have been so affected, or bound with such notice, had this act never been passed.”

The Act of 1907 pertinent to this discussion is as follows:

“ART. 3700. (2312) (2257). Recorded instruments admitted in evidence without proof, when.—Every in-

strument of writing which is permitted or required by law to be recorded in the office of the clerk of the County Court, and which has been, or hereafter may be, so recorded, after being proved or acknowledged in the manner provided by the laws of this State in force at the time of its registration, or at the time it was proved or acknowledged, *or every instrument which has been, or hereafter may be actually recorded for a period of ten years in the book used by said clerk for the recording of such instruments, whether proved or acknowledged in such manner or not, shall be admitted as evidence in any suit in this State without the necessity of proving its execution*, provided, no claim adverse or inconsistent to the one evidenced by such instrument shall have been asserted during that ten years; provided, that the party to give such instrument in evidence shall file the same among the papers of the suit in which he proposes to use it at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record; and unless such opposite party, or some other person for him, shall, within three days before the trial of the cause, file an affidavit stating that he believes such instrument of writing to be forged. And, whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing, recorded as aforesaid, has been lost, or that he cannot procure the original, a certified copy of the record of any such instrument shall be admitted in evidence in like manner as the original could be. *And after such instrument shall have been actually recorded as herein provided for a period of ten years, it shall be no objection to the admission of same, or a certified copy thereof, as evidence, that the certificate of the officer who took such proof or acknowledgment is not in form or substance such as required by the laws of this State; and said instrument shall be given the same effect as if it were not so defective.*"

"Sec. 2. The fact that there are no adequate laws to relieve persons *whose titles to their lands have*

been clouded by insufficient acknowledgments and proofs taken and made by ignorant and incompetent officers, creates an imperative public necessity for the suspension of the constitutional rule requiring bills to be read on three several days, and an emergency exists that this act take effect and be in force from and after its passage, and it is so enacted."

These acts have been so frequently construed that to discuss the authorities construing same would unduly prolong this brief, so, of necessity, we simply cite them:

Arriola v. Newman, 113 S. W., 157 (Court of Civil San Antonio).

Millwee v. Phelps, 115 S. W., 891 (Court of Civil Appeals, Texarkana).

Kinkaid v. Lee, 119 S. W., 343 (Galveston Court of Civil Appeals; writ of error refused by Supreme Court).

Merriman v. Blalock, 121 S. W., 552 (Galveston Court of Civil Appeals, and in which case the instrument of which a certified copy was offered was *not acknowledged at all*).

Bledsoe v. Haney, 122 S. W., 456.

Bledsoe v. Haney, 139 S. W., 613 (Court of Civil Appeals, Fort Worth).

Crayton v. Hamilton, 37 Tex., 269.

Waters v. Spofford, 58 Tex., 115.

McClevey v. Creyer, 28 S. W., 691.

Beaumont Pasture Co. v. Preston, 65 Tex., 457.

The trial judge in his ruling referred to the case in 77 Texas (Rec., p. 363), that is, the case of Hill v. Taylor, 77 Texas, 295; 14 S. W., 366. The only possible bearing that that case can have on this question is that it is there held that to secure a proper record there must be a proper acknowledgment before a proper officer. The acknowledgment which was passed upon in that case was taken outside of Texas, and the validating acts of 1841 and 1860,

hereinbefore quoted, did not have, nor did they purport to have, any bearing thereon. *Hill v. Taylor* does not construe such validating acts.

The Circuit Court of Appeals in this case, in discussing the validating acts of 1841 and 1860, above quoted (226 Fed., 436), uses this language:

“Two other statutes which have been referred to in this connection, one enacted in 1841, and the other in 1860 (2 Gammel’s Early Laws of Texas, p. 632; 4 Gammel’s Early Laws of Texas, p. 1437), each validating the record of instruments which, when they were registered for record, were not entitled to be recorded, plainly have reference to instruments found copied in duly authorized books of public record, and not to instruments found copied in a book, such as the Menard County book which was produced, not entitled to recognition as a legal public record, except insofar as such recognition has been provided for by statute.”

But are the Menard County records on any different footing from the other records in Texas since the Supreme Court of Texas (*Stockton v. Montgomery, Dallah’s Decisions*, p. 473, hereinbefore quoted), in effect, held that the same are *de facto* records? Certainly, the officers of Menard County were *de facto* officers, and the records kept and made by them were *de facto* records.

Riley v. Township of Garfield, 38 Pac., 561; 49 Pac., 85.

State v. Carroll, 38 Conn., 449.

Ashley v. Board of Supervisors, 60 Fed., 55.

Lang v. City of Bayonne, 68 Atl., 90.

State Bank v. Frey, 91 N. W., 239 (Supreme Court of Nebraska).

We respectfully submit that it was error to exclude said certified copy.

**Third Specification of Error, that
the Issue of Execution of Alleged
Deed from Felder to Veatch
Should Have Been Submitted to
the Jury:**

Upon the trial, defendants in error offered what they claim to be the original deed. As in the case of *Williams v. Conger* (125 U. S., 397), the signature thereto was compared with the original signature of Charles A. Felder to his application for his grant.

We do not believe your Honors will reach the conclusion that the person who signed the application for the Felder grant also signed the purported deed from Felder to Veatch. The handwriting experts (see testimony of H. W. Gardner, Rec., p. 648, and J. T. Shelby, Rec., p. 656) are unanimous that the handwriting in the two instruments is not the same. (*The originals are sent up with the Record*). A comparison of these signatures leads inevitably to the conclusion stated.

That the application for the grant contains Felder's genuine signature would seem unreasonable to dispute, and under *Williams v. Conger*, cited above, defendants in error are estopped to dispute. Note the language of the document he signs, and the endorsement of the Commissioner thereon (Rec., pp. 63-64):

"To the Special Commissioner of the Enterprise of Lorenzo de Zavala.

"Charles A. Felder, a native of the U. S. of the North, with due respect, *I present myself before you and say:* That being induced by the generous dispositions of the Colonization laws of this State, I have come with my family consisting of six persons, being married, to settle permanently in the same, should you deem proper on view of the annexed certificate to admit me as a Colonist, and grant to me

the quantity of land to which I am entitled on the vacant territory of the same, being a farmer. Therefore, I pray you will deign to accede to my petition, it being what I expect from your well known justice.

“Nacogdoches August 8th, 1835.

“CHARLES A. FELDER.

“Provision: The *party will pass* with the accompanying Certificate to the Empresario to whom it belongs, that he may inform me in relation to the foregoing petition.

“Nacogdoches August 8th 1835.

“GEORGE ANTO. NIXON COMR.”

Note also the instructions issued by the Executive Department of the State of Coahuila and Texas to Commissioners, of date September 4, 1827. (Early Laws of Texas, Vol. 1, p. 73.) We quote a portion of such instructions:

“Executive Department of the State of Coahuila and Texas.

“Secretary’s Office of the Congress of Coahuila and Texas.

“Instructions to which the commissioner for the distribution of lands to the new colonists, who present themselves to settle in the state, according to the colonization law of March 24, 1825, shall conform. (See, *post*, Art. 82.)

“SEC. 1.—*Certificates of Colonists.*—The commissioner shall be obligated, pursuant to the contract made by the empresario with the government, also to the colonization law of the 24th of March, *to examine in the most scrupulous manner the certificates which colonists from foreign countries are required to bring from the authorities of the place from which they come, thereby proving themselves to be of the Christian religion, and to possess a good moral character, without which requisites they shall not be admitted in the colony.*

“SEC. 2.—*Same.*—In order to guard against false

certificates, the commissioner shall admit none until after the empresario, to whom they shall previously be transmitted for the purpose, shall give information in writing relative to the legitimacy of the same.

"SEC. 3.—*Oath of Colonists.*—*He shall admisinter to each of the new colonists from foreign countries the oath in form to obey the constitution of this republic, that of the state, and the general and special laws of his adopted country.*"

Note the testimony of Mr. C. M. Calloway, the Clerk in the General Land Office of Texas since 1870 (Rec., p. 646), as to the signatures to these applications:

"Q. When signed by attorney, it shows on its face that it is by attorney? A. Yes, sir.

"Q. In other words: 'John Smith, by Peter Jones, Attorney'? A. Yes, sir, that is what I mean."

In *Williams v. Conger* (125 U. S., 397), a Texas case, where almost this identical question arose, this court uses this language:

"The plaintiff himself claims title under the very application of Rabago, the signature to which is claimed to be a proper standard of comparison of Rabago's handwriting. *Is he not estopped from denying it to be Rabago's hand? His counsel say that in that period of time the application did not require the party's signature.* Even if this be so, still it is proved that Rabago was at Saltillo at time the application was made, and it purports to be signed by him, and not by any person for him; and if the document is the real protocol of the application, as presented, it is to be presumed, at least until the contrary is shown, that the signature which it bears is the real signature of Rabago. Whether the document is or is not the real protocol of the application as presented was fairly left to the jury, under the circumstances and evidence of the case—which, we may add, were so strong and convincing that the

jury would not have been justified in finding in the negative. The evidence was indeed such as to abundantly satisfy the condition that the paper referred to as a standard of comparison must be clearly proved to be genuine."

This deed (pages 68-69 of the Record) purports to have been executed with W. B. Barnet and Samuel Palmer as witnesses. It is headed Republic of Texas, County of Jasper, and purports to have been acknowledged before John Bevil, Chief Justice and ex-officio notary public of Jasper County. Presumably, if it was executed, it was executed in Jasper County, and the persons called to witness same would ordinarily be those residing at or near the place of its execution. The deed itself shows that Charles A. Felder was a resident of Shelby County, while John A. Veatch, the purported grantee in the deed, is shown a resident of Sabine County. Just why these persons would go the distance from Shelby County to Jasper County, before a Jasper County officer, and head their deed Jasper County, when neither of them resided there, is not clear.

Eugene McMahon was a witness for plaintiffs in error. (Rec., pp. 546-549.) He testified that he had examined the indices of the Deed Records, the Probate Records, the Marriage Records, the Surveyor's Records, and the Record of Marks and Brands of cattle of Jasper County, and that he was unable to find on said records any reference to either W. B. Barnett or Samuel Palmer. That the records of Jasper County previous to 1849 had been destroyed, but that there were many deeds which had been spread upon the old records, which had been re-recorded upon the new. That he examined such records from 1849 up to 1880, being all of such records there were in Jasper

County. On cross-examination he was asked what other investigation he made to try to locate W. B. Barnett and Samuel Palmer, and he stated that he talked to the oldest persons he could find in Jasper County; i. e., T. H. Holmes, born and raised in Jasper County, aged eighty-one years; Mal Morgan, who is close to ninety years of age and came to Jasper County in 1850; Dave Smith, who came to Jasper County in the '60's; old man Barrow, seventy-five years of age; and that he could not find any person who had ever heard of either W. B. Barnett or Samuel Palmer.

Not resting their case upon an inquiry and examination of the records in Jasper County, upon the theory that possibly Barnett and Palmer had lands or business transactions in other counties in East Texas, the plaintiffs in error had the records of a number of counties examined for any trace of the names of these persons, and likewise any trace of any old persons who knew them.

J. P. McMahon, Jr. (Rec., pp. 549-551), was born and raised in Newton County, which adjoins Jasper County on the east. The records of that county have never been destroyed, and run back to the organization of the county, on July 13, 1846. That he investigated the Deed Records, Probate Records, Marriage License Records, and Marks and Brands Records, commencing with Volume One and running down to 1880, and that he could find no trace whatever of either Barnett or Palmer.

E. J. Newberry testified that he was forty-four years of age, and had lived in Newton County all his life, had been County Judge of the county, and that he had made inquiry of old persons in Newton County to see if anyone had ever known or had ever heard of Barnett and Palmer. That he inquired of Charley Hancock and James Lee, of

Newton County, because Hancock is one of the oldest, if not the very oldest, men in the county, and a man whose recollection is most excellent for one of his advanced age, and a man who has been in public life for a long time. That Hancock is about eighty-six years of age, and it was shown that he was too feeble to come to court. That he found no one who knew of or had ever heard of Barnett or Palmer.

This witness also examined the Marriage Records, the Probate Records and the Deed Records of Orange County (created on March 20, 1852), which adjoins Jasper County on the south, and was unable to find any trace of either Barnett or Palmer. He likewise examined the same records of Hardin County, in which the land is situated, and which lies west of and adjoins Jasper County, and which was created on August 2, 1858, and was unable to find any trace of either Barnett or Palmer.

E. H. Hopson testified that he had examined the old records of Menard County (created in 1841), and the Records of Tyler County (created in 1846), and could find no trace of either Barnett or Palmer, save and except that the purported deed from Felder to Veatch appears spread upon the records of Menard County, which fact is undisputed. Tyler County adjoins Jasper County on the west, and covers the same territory which was formerly covered by old Menard County.

C. A. Woods testified (Rec., p. 537) that he had investigated the Deed Records, the District Court Minutes, the Probate Court Minutes, the Marriage Records and the Mortgage Records, and Mark and Brand Records, that is, the mark and brand records of cattle and other stock, from the beginning of the first records of Jefferson County (Jefferson County created on December 9, 1835), and

that he found no trace of either Barnett or Palmer. Jefferson County adjoins Jasper County on the south.

E. T. Anderson, Clerk of the District Court of San Augustine County, which adjoins Jasper County on the north, and which was created on March 6, 1834, testified that he had examined the old archives, and also the Marriage Records of San Augustine County from 1837 to 1865, the Probate Records from 1837 to 1877, and likewise the Deed Records of said county, during said period, and found no trace or reference to either W. B. Barnett or Samuel Palmer. He further stated that his examination included the old original archives of the county. (Rec., p. 632.)

John S. Doughtie testified (Rec., p. 592) that he resided in Nacogdoches County, and had resided there for thirty years, and that he had examined the old records of Nacogdoches County (created January 31, 1831), including the old archives, the Probate Records, the Marriage Records, the Deed Records, etc., of that county, and that he found no trace of either Barnett or Palmer. It will be noted that Nacogdoches was the headquarters of de Zavala's colony, of which Charles A. Felder was a member, and that the grant itself to Charles A. Felder was issued at Nacogdoches. The old archives mentioned at San Augustine and Nacogdoches are the old archives of the Mexican Government prior to the creation of those counties and prior to the Independence of Texas.

H. M. Richter testified (Rec., p. 534) that he had examined the Mortgage Records, Probate Records, Marriage Records and Divorce Records and Deed Records of Harris County (created in 1835) as far back as the records of Harris County go, down to 1860 or 1865, and that he could find no trace of either W. B. Barnett or Samuel Palmer.

If there were any such persons as Barnett and Palmer, it is fair to assume that they lived at least as long as the purported vendee of the deed, John A. Veatch. He died in 1870. It is a well known historical fact, as well as a matter of law, in Texas, that the grants of land were made by the Republic of Texas to almost every class of persons in Texas, about the time that it is claimed that Barnett and Palmer were here, and witnessed this deed. There were headrights to married men, and headrights to single men, bounty warrants for services in the army, donation warrants, etc. It is passing strange that these men, if there were such men, did not get their names on the records of the county in which it seems that this deed was executed, if it was executed, or some of the surrounding counties, either on the Marriage License Records, the Deed Records, the Probate Records, or the Mark and Brand Records of Cattle and Other Live Stock. It is contrary to the common experience of men at that date in Texas. Of course, the proof offered is the proof of a negative fact, and it is, therefore, difficult, as is the proof of all negative facts, to place the question where it could not be said that there was doubt about it. But it was a question for the jury to decide, and not for the court.

But counsel will contend that the deed was acknowledged before John Bevil, Chief Justice and Notary Public of Jasper County. A complete answer to this is that one who would forge a deed, and the names of fictitious persons thereto as witnesses, would have no hesitation in perpetrating a fraud upon the officer taking the acknowledgment, by producing before such officer a person other than Charles A. Felder.

John A. Veatch seems to have left the county in 1848 or 1849, going to California. A number of witnesses tes-

tify to his good reputation there. (See testimony of David Rafferty, Rec., p. 123; C. H. Rafferty, Rec., p. 129; O. B. Johnson, Rec., p. 141; Mrs. Annie E. Snow, Rec., p. 145.) None of said witnesses know anything of his life or reputation in Texas, nor do they undertake to testify upon that point. Henry Ralph testified (Rec., pp. 104-111) that he knew Veatch, but Ralph was only ten years of age when Veatch left the country. He testified that he knew the general reputation of Veatch in the community, and that it was good. Just how a boy of that age could either qualify, or testify intelligently, to the reputation of a man who left the country when he was ten years of age, and has not returned since, and whom he has not known since, is difficult to imagine. He says that Veatch was a country doctor, living on a small farm in Jasper County, and the impression given by his testimony is that he was a man of limited means, and that it is extremely unlikely that he would have had the cash to pay the sum for the Felder league that the deed recites was paid.

T. B. Beatty likewise (Rec., p. 112) testifies as to Veatch's character, and says:

"I just can remember him. It is so far back I can just remember the man, is all."

It will be noted, also, that this witness was *only six years old* at the time he learned of the reputation of Veatch, and at the time he knew, or knew of, Veatch. If admissible, the probative force of this testimony is so meager as to require no comment.

Mrs. Nellie R. Lowe testified (Rec., p. 117) that she was about twelve years old when she knew John A. Veatch. The suggestions made as to the admissibility and pro-

bative force of the two former witnesses' testimony is made as to this one.

While there are in some of the cases some suggestions that non-claim upon the part of persons holding under deeds attacked as forgeries is not a circumstance which should be considered in determining whether or not such deed is or is not a forgery, we are unable to bring ourselves to the conclusion (and we believe your Honors will find yourselves in the same position) that this is the law, It is contrary to human experience. Human experience is that persons abandon claims which are found by them to be spurious, whether the acts which constitute the claim spurious, whether the acts which constitute the claim spurious were done by such persons or by their predecessors in title. A good man does not want to claim under a forged deed, if he is convinced of that fact, and his first impulse is, upon learning the facts, to abandon any claim.

Hereinbefore in this brief we discuss fully and in detail the facts showing that the title of plaintiffs in error is the active title, and has been such since 1837, and that the title asserted here by defendants in error is the dormant title.

Was the court correct in refusing to permit the jury to pass upon whether or not the Veatch deed was a forgery? Probably the latest expression upon the law of this question is found in the opinion of Mr. Justice Harlan, in *Delk v. Railroad* (220 U. S., 583). It is there said:

"It was contended at the trial of this case that the court erred in not instructing the jury, as a matter of law, in accordance with the defendant's request, that the plaintiff was guilty of contributory negligence of such character as to bar him from relief. The rule upon that subject is well settled by the authorities. It is that 'when the evidence given at the trial, with

all inferences that the jury could justifiably draw from it, is insufficient to support a verdict for the plaintiff, so that such a verdict, if returned, must be set aside, the court is not bound to submit the case to the jury, but may direct a verdict for the defendant.' *Pleasants v. Fant*, 22 Wall., 116, 122, 22 L. Ed., 780, 783; *Randall v. Baltimore & O. R. Co.*, 109 U. S., 478, 482, 27 L. Ed., 1003, 1005; 3 Sup. Ct. Rep., 322; *Phoenix Mut. L. Ins. Co. v. Doster*, 106 U. S., 30, 32, 27 L. Ed., 65, 66, 1 Sup. Ct. Rep., 18; *Connecticut Mut. L. Ins. Co. v. Lathrop*, 111 U. S., 612, 615, 28 L. Ed., 536, 537, 4 Sup. Ct. Rep., 533. *In the Doster case, it was said that where a cause fairly depends upon the weight or effect of the testimony, it is one for the consideration and determination of the jury under proper instructions as to the principles of law involved.* These rules being applied in the present case, we are clear that the court would have erred if it had taken the case from the jury, and directed a verdict for the company. The evidence in this case was by no means all one way. There was fair ground for difference of opinion, and the court's refusal to instruct the jury, *as a matter of law*, that the evidence established the defense of contributory negligence, was right."

In *Bamberger v. Schoolfield* (160 U. S., 157), it is said:

"In the discussion at bar, the plaintiff in error has devoted much of the argument in arguing that the trial court erred in declining a request by him made to instruct the jury to return a verdict in his favor, if they believed the testimony, but this request was manifestly rightly refused. *It involved a finding by the court as to weight of evidence, and practically asked it to usurp the province of the jury, by determining the proper inferences to be drawn from the evidence, and deciding on which side lay the preponderance of proof.*"

In *Gardner v. Railway* (150 U. S., 349), it is said:

“The question (in that particular case the issue was negligence *vel non*) is one of law, for the court only, where the facts are such that all reasonable men must draw the same conclusion from them, or, in other words, a case should not be withdrawn from the jury unless the conclusion follows as matter of law that no recovery can be had from any view which can be properly taken of the facts the evidence tends to establish,” citing *Railway Company v. Ives*, 144 U. S., 408; *Railway Company v. Cox*, 145 U. S., 593.”

Other authorities helpful are:

Railway v. Svedorg, 194 U. S., 201.

Railway v. James, 163 U. S., 485.

White v. Van Horn, 159 U. S., 3.

Lee v. Powell, 151 U. S., 436.

Clearly, the question of the forgery of the Veatch deed was a question of fact, and not a question of law, nor a mixed question of fact and law. The issue of whether Felder signed the Veatch deed at all was clearly raised by the evidence, not only in the absence of the similarity of signatures with his application for the grant, but also in whether the witnesses to the Veatch deed were fictitious persons. And if the jury found the above named facts against the Veatch title, the issue of whether some person was procured to impersonate Felder before the notary, was raised. All this, coupled with the non-claim under the Veatch deed for more than seventy years, and the circumstances above detailed with reference thereto, and the active claim on the part of those holding under the other chains of title out of Felder, present issues of fact that were jury questions, and not for the court to determine. Can it be said under all these circumstances, that if the jury had returned a verdict in favor of the Oil

Company et al., and to the effect that the deed from Felder to Veatch was a forgery, and spurious, the conscience of the court would have been so shocked as to require the verdict to be set aside?

An examination of the Texas authorities upon this question may be found helpful. The article of the Texas statutes applicable is as follows (Art. 3700, Rev. St. of 1911):

“Recorded instruments admitted in evidence without proof, when.—Every instrument of writing which is permitted or required by law to be recorded in the office of the clerk of the County Court, and which has been, or hereafter may be, so recorded, after being proved or acknowledged in the manner provided by the laws of this State in force at the time of its registration, or at the time it was proved or acknowledged, or every instrument which has been, or hereafter may be, actually recorded for a period of ten years in the book used by said clerk for the recording of such instruments, whether proved or acknowledged in such manner, or not, shall be admitted as evidence in any suit in this State without the necessity of proving its execution, provided no claim adverse or inconsistent to the one evidenced by such instrument shall have been asserted during that ten years, provided, that the party to give such instrument in evidence shall file the same among the papers of the suit in which he proposes to use it at least three days before the commencement of the trial of such suit, and give notice of such filing to the opposite party or his attorney of record, *and unless such opposite party, or some other person for him, shall, within three days before the trial of the cause, file an affidavit stating that he believes such instrument of writing to be forged.* And whenever any party to a suit shall file among the papers of the cause an affidavit stating that any instrument of writing, recorded as aforesaid, has been lost, or that he cannot procure the original, a certified copy of

the record of any such instrument shall be admitted in evidence in like manner as the original could be, and after such instrument shall have been actually recorded as herein provided for a period of ten years, it shall be no objection to the admission of same, or a certified copy thereof, as evidence, that the certificate of the officer who took such proof or acknowledgment is not in form or substance such as required by the laws of this State, and said instrument shall be given the same effect as if it were not so defective. (Acts 1846, p. 387; Acts 1907, p. 308; P. D., 3716.)”

An affidavit of forgery was filed against the purported deed from Felder to Veatch. (Rec., p. 50.)

The filing of this affidavit of forgery, under the Texas law, made it incumbent upon defendants in error, claiming under the purported deed from Felder to Veatch, to prove said instrument by some of the methods known to common law. (Willis v. Lewis, 28 Tex., 186; Williams v. Conger, 49 Texas, 592; Storey v. Flannigan, 57 Texas, 649; Cox v. Cock, 59 Texas, 521; Robertson v. DuBose, 76 Texas, 1.)

As was said in Cox v. Cock, *supra*:

“When the proper affidavit is filed, as was done in this case, attacking the deed offered in evidence, such deed cannot be received in evidence without the usual proof of its execution, but when such proper proof is made, as was done in this case, it is not error to allow the deed to go to the jury as *prima facie* a genuine instrument. The impeaching affidavit has served its purpose. It has compelled the party claiming under the deed to prove its execution in accordance with the rules of evidence, and thus remove the suspicion cast on it by the affidavit of forgery. It throws upon the shoulders of the party offering the deed the burden of proving its execution in accordance with the rules of common law. If the party impeaching the deed desires to do so, he is at liberty to proceed to sustain by any lawful testimony his plea of *non est factum*. If he introduces no proof whatever (the affidavit

83

not being evidence), and the opposing party proves the making of the deed in accordance with some one of the methods prescribed by the common law, the genuineness of the deed is established. The jury, in the absence of all proof sustaining the plea of *non est factum*, could not find otherwise." (59 Tex., 524.)

The trial court held that the deed from Felder to Veatch was an ancient instrument, came from the proper custody, and was free from suspicion, etc., *and admitted it in evidence*. Bear in mind that its admission in evidence is entirely separate and distinct from its validity as a title-passing document. It was for the court to determine primarily whether this instrument should be admitted to the jury for the jury's consideration. It was then for the jury to determine whether or not the deed had been in fact executed by Felder to Veatch. We have already fully discussed the evidence offered upon that issue. Under the Texas authorities, it is clear that, under this evidence, this issue should have gone to the jury.

In the case of *Beaumont Pasture Co. v. Preston* (65 Tex., 448), the ancient document came from the proper custody, had the appearance of age, was sufficiently authenticated, and was produced and admitted in evidence at the trial. But it is said by the court:

"The name of the grantee and the date appear to have been written in different ink and penmanship, and probably at a different time, from the other words in the instrument. The naked eye does not discover the change in the date testified about by the experts."

The court held it to be a question of fact for the jury, and, in passing upon the question, uses the following very pertinent language:

"Courts of chancery have built up a great and wise system of rules to govern themselves in deter-

mining questions of fact. They are but so many scales for weighing the different kinds and phases of testimony not allowed to be furnished to the jury. A jury knows nothing of these rules; they search for the truth with the free use of all their faculties, and doubtless find it more generally by instinct, intuition and common sense than they would by any process that would filter or exclude the use of these honest and fearless guides. The finest feature, perhaps, of a jury trial is that it ends in a verdict which is not the result of artificial and technical tests and measures; and this feature our statute has carefully preserved by forbidding an instruction upon the weight of the evidence."

In the case of *Warren v. Fredericks* (76 Tex., 647; 13 S. W., 643), the ancient instrument, against which an affidavit of forgery has been filed, was from Solomon Hall to William Walker, and was found under such circumstances and surroundings as indicated its validity. But contradictory evidence upon that point was offered. The Supreme Court of Texas, in that case, says:

"The deed from Solomon Hall to William Walker was read to the jury by defendant. Plaintiff objected to it upon the following grounds: (1) Because proof of any action having been taken under it was insufficient; (2) because it did not come from the proper custody; (3) because it had been attacked as a forgery. The deed was over 30 years old. Defendant produced it, and offered evidence tending to account for its custody while it was out of the actual possession of the heirs of William Walker. The power of attorney that was testified to as having been found among the papers of Walker, and referring to it, was properly considered. We think that, under these circumstances, the ruling permitting the deed to be read was correct. When the preliminary proof upon which the deed is permitted to be read is disputed or is conflicting, it is proper for

the court, under proper instructions, *to submit the issue to the jury*. If it had been requested, it would have been proper to submit that issue in this case."

In *Williams v. Conger* (49 Tex., 596), it is held that where an ancient instrument comes from the proper custody, etc., and is free from erasures, interlineations, etc., that it is admissible in evidence, *prima facie*, but that it is for the jury to determine its genuineness.

To the same effect is *Ganer v. Cotton* (49 Tex., 101).

One of the strongest fact cases is the case of *West v. Houston Oil Company* (102 S. W., 927), and the facts in that case are similar to the facts in the case under discussion.

In *Belcher v. Fox* (60 Tex., 527), certain ancient instruments were attacked as forgeries, and it is there said:

"The original deeds were not produced, and strong must be the corroborating facts to authorize the holding that a deed even thirty years old is genuine when the original is not produced, and a copy from the record, or the record, is relied upon to show even the existence of the paper. Such proof, at best, is but secondary. *When the deed itself is introduced, coming free from suspicion and from the proper custody, even then facts corroborative of its ancient existence and genuineness must be proved.* *Stroud v. Springfield*, 28 Tex., 663; *Newby v. Haltaman*, 43 Tex., 317; 1 *Greenleaf*, 570; 1 *Wharton's Evidence*, 732, 733; *Starkie on Evidence* (9th Ed.), 521; *Holmes v. Coryell*, 58 Texas, 685.

"When acts are relied upon as corroborative they should be such as are contemporaneous with the life of the person who is claimed to have executed the instrument, if he lived for many years after the apparent date of the instrument, if not nearly contemporaneous with the date of the instrument itself; be open in their nature, and such as evidence a *clear*

claim of title consistent only with such an instrument as is claimed to have been made; the mere existence of the instrument is not enough."

To the same effect is *Brown v. Simpson* (67 Tex., 231).

In *Stookesbury v. Swann* (85 Tex., 563; 22 S. W., 963), an ancient instrument had been attacked as a forgery. We believe that your Honors will be greatly aided by that case. We quote briefly from the opinion:

"The charge placed the burden of proving that the deed was not genuine upon the plaintiffs. Was that correct? The land having been granted to an ancestor of Mrs. Stookesbury, proof that she was the sole heir entitled her to a judgment, in the absence of testimony sufficient to show that her mother, joined by her father, executed the instrument under which defendants claim.

"The burden of bringing evidence to show that that instrument was executed by them rested upon those who asserted that fact, and a charge to the contrary was erroneous. Upon whom rests the burden of bringing evidence to establish a material issue of fact must be determined by the court; but whether that burden has been met, when there is a conflict of evidence, must be determined by the jury.

"The charge assumed that the age of the instrument entitled it to admission as evidence, without reference to proof of the necessity of corroborative facts, and, in effect, informed the jury that its age and admission made it necessary for plaintiffs to bring evidence sufficient to show that it was not executed by the father and mother of Mrs. Stookesbury.

"There are several objections to such a charge:

"On the issue as to the genuineness of the instrument, the jury were entitled to look to all the evidence tending to prove or to disprove any corroborative fact necessary to be shown and considered by the court in the first instance in determining whether the instrument should be admitted, and the charge was

calculated to induce the belief that all facts of this character had been conclusively settled by the court when the paper was admitted as an ancient instrument."

We likewise call attention to the opinion of the Court of Civil Appeals, in *Stookesbury v. Swann*, reported in 34 S. W., 369. Writ of error was denied by the Supreme Court. (73 Tex., 739.)

The case of *Houston v. Blythe* (60 Tex., 506) will be found a helpful case on this question.

We respectfully but earnestly insist that the question of the forgery of the Veatch deed should have been submitted to the jury.

Fourth and Fifth Specifications of Error, that the Issue of Whether John A. Veatch, Vendee under the Junior Deed, was or was not a Bona Fide Innocent Purchaser for Value without Notice of the Senior Deed from Felder to Daniel Should Have Been Submitted to the Jury, or the Jury Instructed to Return a Verdict for Plaintiffs in Error:

The Honorable Circuit Court of Appeals holds that there was no evidence which would justify the submission of this issue to the jury. In this said court wholly ignores that such fact may be shown by circumstantial evidence (we call attention to *Holland v. Nantz*, 102 Tex., 177, 114 S. W., 346), and that after this long lapse of time any direct evidence, from the very nature of the case, cannot be produced. There was a time when direct evidence could have been produced, if the question had been raised. If James Morgan, under whom interveners

in this case claim, and who lived until 1866, had raised this question and protested against the active claim and acts of ownership hereinbefore detailed, which were then being exercised by those holding under the Daniel deed, then direct evidence could unquestionably have been produced upon the issue. John A. Veatch died April 24, 1870 (Rec., p. 124), twenty-eight years after the Daniel deed went to record in Menard County, and during all that period those holding under the Daniel deed were asserting active ownership to this land, and no effort was made by those whose title defendants in error have to recover same, and not a suit was filed in which to show, by Veatch, that he had no notice of such senior deed. John Bevil, Chief Justice of Jasper County, who, it is claimed, took the acknowledgment of Charles A. Felder to the Veatch deed, died in 1863, twenty-one years after the Daniel deed went to record in Menard County. Very probably, he could have testified as to whether Veatch was an innocent purchaser as to the Daniel deed, and whether Veatch paid value. But no effort was made by those under whom defendants in error claimed, during Bevil's lifetime, to recover the land and make such proof by him. Of the witnesses to the purported Veatch deed, W. B. Barnett and Samuel Palmer, nothing could be found out, as we have shown in our discussion of the execution of the Veatch deed, and the evidence in this record makes it almost certain that there were no such persons.

The true meaning of the holding of the Honorable Circuit Court of Appeals is that the presumptions are with the dormant title. The law is to the contrary. All the presumptions are in favor of the active title as against a dormant title, and the issue of whether Veatch was such *bona fide* innocent purchaser for value should have been

submitted to the jury. Indeed, we believe that under the record in this case, it was the duty of the court to have directed a verdict in favor of plaintiffs in error, and to have instructed the jury that the presumptions are in favor of the active title, and that it would be presumed that Veatch was not an innocent purchaser and did not pay value.

It is almost the universal rule that the burden of proof is upon the junior purchaser to show that he is such *bona fide innocent* purchaser for value; but the Supreme Court of Texas has held that *under the Act of 1836*, in force at the date of the execution of these two deeds, the burden of proof of such fact is upon those holding under the senior chain of title.

Kimball v. Houston Oil Company of Texas, 100 Tex., 336; 99 S. W., 852.

We submit, however, that the evidence in this case abundantly satisfies the burden of proof.

Sixth and Seventh Specifications of Error, that the Issue of Whether the Deed from Felder to Daniel, under Which Plaintiffs in Error Claim, was Presented for Record in Liberty County Prior to the Alleged Execution of the Deed from Felder to Veatch, under Which Defendants in Error Claim, Should Have Been Submitted to the Jury:

It cannot be disputed (and we take it will not be) that if the deed from Felder to Daniels was presented to the Clerk of the County Court of Liberty County for record prior to the execution of the deed from Felder to Veatch (June 18, 1839), the title of the plaintiffs in error must prevail.

We have shown that it is held in *Houston Oil Co. v. Kimball* that under the Act of 1836 the burden of proof of notice, etc., is upon those holding under the senior or Daniels deed, *provided* that it *had not been presented for record* at the date of the execution of the Veatch deed. In other words, the Kimball case deals with a senior *unrecorded deed*. Have we necessarily a senior *unrecorded* deed here? Has it been shown that the Daniels deed was not recorded in Liberty County prior to the date of the Veatch deed? It has been agreed (Rec., p. 58) that all of the Deed Records and Court Records of Liberty County were destroyed by fire in the year 1874, and that the Clerk of the County Court of Liberty County who officiated from 1838 to 1840 is dead.

The Daniels deed itself could not be produced. The most strenuous search for it upon the part of the oil company is shown. (Testimony of H. M. Richter, Rec., p. 308; Charles T. Butler, Rec., p. 313; Horace Word, Rec., p. 315; J. M. Cook, Rec., p. 332.) It is manifestly impossible, therefore, for either party to produce any direct evidence that the Daniels deed was not presented for record prior to the execution of the Veatch deed, and that it did not remain of record until the destruction of such records in 1874.

At the threshold of the question, are not defendants in error, holding under the junior Veatch deed, required to show that the Daniels deed was not so presented for record prior to the execution of the Veatch deed? We are not aware that this question has ever been passed upon by the Texas courts. In nearly every instance it is at once apparent that the senior deed was or was not presented for record prior to the execution of the junior deed. Would not the burden be upon defendants in error to pre-

sent a case which would come within the 1836 statute, by showing the failure to record the Daniels deed? In the absence of the statute, the common law would control. Section 40 of the Act of 1836 relates to registration. By Section 41 of the same act the common law is adopted in Texas. Under the common law, the burden of proof would be upon the junior purchaser. Until those holding under the Veatch deed show that the Daniels deed was not presented for record, and recorded, and present a case to which it applies, they cannot claim the protection of the Act of 1836.

If the burden is upon those holding under the senior deed to show its presentation for record, is it not true that that burden has been met in this case by long active claim thereunder, so as to entitle plaintiffs in error to have this question submitted to the jury? The fact of such presentation may be shown by circumstantial evidence. In our discussion in the two previous propositions, we call attention to the long non-claim of defendants in error, and to the long and active claim of the plaintiffs in error and those under whom they claim, to which discussion we refer. Particularly do we call attention that the suit brought by the executors of Morgan *before the destruction of the Liberty County records*, and the non-prosecution and dismissal of that suit, and to the unexplained circumstance of the parties waiting until *after the Liberty County records were destroyed, and the Clerk of the court had died, and the Daniels deed had become lost*, to bring this suit.

We respectfully insist that the question of the presentation for record of the Daniels deed should at least have gone to the jury.

**Discussion of the Presumptions
Which will be Indulged in Support
of Plaintiffs in Error's Active
Title:**

The effect of the ruling of the trial judge and of the Circuit Court of Appeals is to resolve all the presumptions in favor of the inactive and dormant title as against the active title. We submit that under the evidence in this Record, and which we have endeavored to point out in the earlier parts of this brief, the presumption arises under the authorities:

(1) That the deed from Felder to Daniel, under which plaintiffs in error claim, was in fact executed.

(2) That said deed was presented for record in Liberty County, where the land was then situated, and where the records have since been burned, prior to the date of the alleged execution of the deed from Felder to Veatch, under which defendants in error claim.

(3) That John A. Veatch, the vendee under the junior deed from Felder to Veatch, was not a *bona fide* innocent purchaser for value without notice of such senior deed from Felder to Daniel.

The last (6th) paragraph of the opinion of the Circuit Court of Appeals is as follows:

“Much has been said in the argument of the counsel for the plaintiffs in error about the failure of the defendants in error and those under whom they claim to acquire possession of the land during the long period of the existence of the claim which is asserted by the suit. The only statute relied upon, or of which we are aware, other than ordinary statutes of limitation in favor of adverse possessors, which purports to give to a grantee's failure to assert the right to land which a conveyance to him purported to confer the effect of impairing that right in favor of the

holder of an inconsistent claim is the one of 1907 above mentioned, the term of which, as above stated, make it inapplicable to the facts of this case. In the absence of a statute having such an effect, the holder of the legal record title to land, not divested by another's adverse possession for a period sufficient to confer title, or in any other way recognized by law, is not deprived of the right to sue for and recover the land as a consequence of the previous failure of himself or of his predecessors in title to exercise the rights of dominion and possession which the title conferred. The defendants having failed in their attack on the record title relied upon by the plaintiffs, they could not, without sustaining any of the asserted claims to the land sued for which were based upon alleged adverse possession of it for periods sufficient to bar plaintiffs' right to recover, be entitled to hold it as against the plaintiffs because of the previous inactivity of the latter or of their predecessors in title in asserting their rights. In the absence of a statute having such an effect, the age of the record title to land, though unaccompanied by possession, does not, except in favor of an adverse possessor, impair the rights it confers on the holder of it, unless it has been divested, or the right to assert it has been lost or barred in some way provided for by law."

It is, of course, conceded that if Veatch, and not Daniel, took title out of Felder, the title still is in those claiming under Veatch unless defeated by limitation in favor of plaintiffs in error.

We have never contended that the long non-claim by defendants in error, which seems to have impressed the Circuit Court of Appeals as being so unusual, was sufficient to divest title out of Veatch and those claiming under him.

Our claim is and has at all times been that long, active claim of nearly three-quarters of a century of those

claiming under the Daniel deed, and non-claim by those claiming under the Veatch deed, is sufficient to support and require a finding that Veatch never had the title, and Daniel did have the title. And sufficient to require the submission to the jury of the issue of the execution of the Felder to Daniel deed, and the submission to the jury of every other issue necessary to be found to support the active title. Our position and claim further is that if necessary a deed from Felder to Daniel will be presumed in support of the active title, and that every other necessary step and circumstance will be presumed in support of same. And that the authorities, State and Federal, without exception, support this view.

This question is so thoroughly discussed in the opinion of this court by Mr. Justice McKenna in *United States v. Chavez* (175 U. S., 522), and in *Fletcher v. Fuller* (120 U. S., 534), that we content ourselves by referring to those two cases. Notice particularly the language in the Chavez case, in which it is stated that presumption may be built upon presumption in support of possession and active claim. Again, it is said in same case:

“We think there can be but one conclusion in the case: the possession of the land began in wrong, or began in right. If in wrong, it must be shown. The maxims of the law declare the other way.”

The possession of the plaintiffs in error and those under whom they claim either began in wrong or it began in right. It began back in the '50's, when Thomas J. Word surveyed out the land and placed a tenant thereon, and has continued from time to time since. During the twenty years previous to the filing of this suit, it has been practically continuous. Acts of ownership in addition to pos-

session, i. e., payment of taxes, cutting of timber, etc., are conspicuous.

The highest courts of Texas have sometimes gone even beyond the Federal Courts on this point.

The case of Texas Mexican R. R. Co. v. Euribe, 85 T., 386, 20 S. W., 153, is in point. The Supreme Court of Texas, in that case, refers to some of the earlier decisions, which earlier decisions were to the effect that presumption of grant based on long claim, etc., was a presumption of fact for the jury. In the 85th Texas case, however, it is held that where the facts are undisputed (as they are in the case at bar), the court will hold as a matter of law that the title is in the person having such long claim, etc.

One of the strongest Texas cases upon this point is the case of Frugia v. Trueheart, 106 S. W., 737, Galveston Court of Civil Appeals, in which writ of error was refused by the Supreme Court of Texas. There the rule is laid down that where defendants claim under a lost deed, over 30 years old, and they and those under whom they hold have, during that time, openly and with the acquiescence of plaintiffs, claimed and exercised such acts of ownership as might reasonably be expected from the owners, and the alleged grantor in the lost deed did not claim ownership, nor did his children during their lifetime, and did not pay taxes on the land, and recitals in instruments and records over 30 years old tend to support defendants' title, the jury may presume the existence of the deed.

To the same effect is Hirsch v. Patton, by the same court, reported in 108 S. W., 1016. See, also:

Garner v. Lasker, 71 T., 431.

Baldwin v. Goldfrank, 88 T., 257.

Arthur v. Ridge, 89 T., 15.

Maxson v. Jennings, 48 S. W., 781.

Bringinghurst v. Texas Co., 87 S. W., 893.

We take it that no further citation of authority is necessary upon a rule so thoroughly and firmly established, both in the Texas and Federal Courts.

A maxim is: "Lapse of time brings to the aid of all things a presumption of regularity." Also, it has been said:

"No greater obligation lies upon a court of justice than that of supporting a long continued enjoyment by every reasonable presumption." Broom's Legal Maxims, page 949.

This is but another way of saying that presumption of right follows the long past and continued conduct of the respective opposing claimants, when the controversy arises over the existence of some ancient matter, and the conduct of both has been uniformly consistent with the claim of one, the other claim being meanwhile ignored and apparently abandoned.

We believe that the facts are sufficient to justify an instructed verdict in favor of plaintiffs in error—certainly they require the submission of such issues to the jury.

Eighth, Ninth and Tenth Specifications, Discussing the Texas Three, Five, and Ten-Year Statutes of Limitation as Applied to the Facts in This Case:

The Texas statutes of limitation, which have been in force for many years, are as follows:

"Article 5672 (3345).—*Three years possession, when a bar.*—Every suit to be instituted to recover real estate, as against any person in peaceable and adverse possession thereof under title or color of title, shall be instituted within three years next after the cause of action shall have accrued, and not after-

ward. (Act Feb. 5, 1841, p. 119, Sec. 15. P. D., 4622.)”

“Art. 5673 (3341).—‘Title’ and ‘color of title’ defined.—By the term ‘title,’ as used in the preceding article, is meant a regular chain of transfer from or under the sovereignty of the soil, and by ‘color of title’ is meant a consecutive chain of such transfer down to such person in possession, without being regular, as if one or more of the memorials or muni-ments be not registered, or not duly registered, or be only in writing, or such like defect as may not extend to or include the want of intrinsic fairness and honesty; or when the party in possession shall hold the same by a certificate of headright, land warrant or land scrip, with a chain of transfer down to him in possession. (*Id.*, Sec. 15, P. D., 4622.)”

Ewing v. Burnet, 11 Peters, 41.

Stafford v. King, 30 Texas, 259.

League v. Rogan, 59 Texas, 427.

Parker v. Baines, 65 Texas, 605.

“Art. 5674 (3342). *Five years’ possession, when a bar.*—Every suit to be instituted to recover real estate as against any person having peaceable and adverse possession thereof, cultivating, using or enjoying the same and paying taxes thereon, if any, and claiming under a deed or deeds duly registered, shall be instituted within five years next after the cause of action shall have accrued, and not afterward; provided, that this article shall not apply to anyone in possession of land, who, in the absence of this article, would deraign title through a forged deed; provided, further, that no one claiming under a forged deed, or deed executed under a forged power of attorney, shall be allowed the benefits of this article. (*Id.*, Sec. 16; P. D., 4623; Acts 1879, ch. 125, p. 132.)”

“Art. 5675.—*Ten years’ possession, when a bar.*—Any person who has the right of action for the recovery of any lands, tenements or hereditaments against another having peaceable and adverse pos-

session thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. (Id., Sec. 17, P. D., 4621-4624.)”

“Art. 5676 (3344).—*Ten years’ possession construed to embrace, what.*—The peaceable and adverse possession contemplated in the preceding article, as against the person having right of action, shall be construed to embrace not more than one hundred and sixty acres, including the improvements or the number of acres actually inclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor’s claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument. (Id., P. D., 4624.)”

“Art. 5679 (3196).—*Possession gives full title, when.*—Whenever in any case the action of a person for the recovery of real estate is barred by any of the provisions of this chapter, the person having such peaceable and adverse possession shall be held to have full title, precluding all claims.”

“Art. 5680 (3197).—*‘Peaceable possession’ defined.*—‘Peaceable possession,’ within the meaning of this chapter, is such as is continuous and not interrupted by adverse suit to recover the estate. (Acts 1841, p. 119, Sec. 14; P. D., 4621.)”

“Art. 5681 (3198).—*‘Adverse possession’ defined.*—‘Adverse possession’ is an actual and visible appropriation of the land, commenced and continued under a claim of right inconsistent with and hostile to the claim of another.”

“Art. 5682 (3199).—*Possession may be held by different persons.*—Peaceable and adverse possession need not be continued in the same person, but when held by different persons successively there must be a privity of estate between them.”

In connection with claim by limitation, attention is

drawn to additional deeds to those already mentioned, offered in evidence by plaintiffs in error:

(a) Deed from Charles A. Felder to Joshua Smith, dated May 21, 1840, conveying the Felder league. (Rec., p. 349.)

(b) Deed from Joshua Smith to Mary E. Brown, dated February 27, 1850, conveying the Felder league. (Rec., p. 354.)

(c) Deed from R. O. Lusk to T. J. Word, dated October 5, 1855, conveying Felder league. (Rec., p. 357.)

(d) Deed from N. B. Scott to Texas Pine Land Association, dated April 6, 1898, conveying the Felder league. (Rec., p. 381.)

There is abundant evidence in this Record to require the submission of the issue of plaintiffs in error's title under the ten-year statute of limitation to the jury. Some of the evidence is disputed by defendants in error's witnesses, but this only raises issues of fact for the jury to determine. A reference to all the facts and circumstances, disputed and undisputed, would so prolong this discussion as to not be permissible, but by the following witnesses sufficient facts are shown to make the question of ten years' limitation one for the jury:

Testimony of John H. Kirby (Rec., pp. 253-288).

R. E. Wall (Rec., pp. 291-308).

J. E. Withers (Rec., pp. 458-474).

A. L. Harris (Rec., pp. 481-501).

W. W. Willson (Rec., pp. 436-457).

Elias K. Ward (Rec., pp. 599-614; also pp. 695-707).

N. B. Scott (Rec., pp. 615-625; also pp. 718-722).

W. T. Hooker (Rec., pp. 474-481).

S. A. McNeeley (Rec., pp. 527-534).

W. T. Carroll (Rec., pp. 685-695).

Joe Bumpstead (Rec., pp. 565-592).

Mrs. L. Mattingly (Rec., pp. 519-526).

T. E. Danziger (Rec., pp. 223-252).

From these witnesses it clearly appears that the G. B. & K. C. Railroad, which runs north and south across this land, was built north out of Beaumont, and reached the land in question during the fall or winter of 1893, and there was then established upon the land in question by said railroad company a sand pit. The land was then owned by the Texas Pine Land Association, the vendor of plaintiffs in error, and a contract was made between the Texas Pine Land Association and said railroad company whereby sand was sold to the railroad company to ballast its tracks and fill in in its yards and depots. Mr. Kirby, Vice-President and General Manager of said railroad, said:

“We had a gumbo district this side of Pine Island Bayou, and put enough sand there to fill the Neches River.”

This sand came out of this pit. Commercial sand, that is, sand hauled to Beaumont and sold to the public, was also taken from the pit. The manner of operations was different at different times. Most of the time the Texas Pine Land Association's employes loaded the sand on the cars, but at times the sand was loaded by the employes of the railroad. Certain buildings, houses, etc., were erected for the purpose of sheltering the men and tools engaged in this work. Such operations were continuous up to the time the Texas Pine Land Association sold to the Houston Oil Company of Texas, and the G. B. & K. C. Railroad was sold to the Santa Fe. Said G. B. & K. C.

Railroad also established on this land a water tank, with a pump to pump water from Village Creek, nearby, said water to be used for engine purposes. They had a pumper in charge to look after such operations. For a time he lived in the pump house, built there by the railroad, but later, when W. T. Carroll became the pumper, he built the house (No. 1 shown in the photographs). This house was not on the railroad right-of-way, but was at least fifty feet from the outer edge of said right-of-way. It was built there in 1901. It was built there by the permission of the Texas Pine Land Association, given to the G. B. & K. C. Railroad, by whom Carroll was employed, and said house was there at the time of the trial of this case in the trial court. The Texas Pine Land Association also cut large quantities of ties from the land in question, having thereon its tie camps; also cut wood therefrom, which was sold to the railroad for use in its engines. The wood yard was on the land in question.

Soon after the purchase of the property by the Houston Oil Company of Texas from the Texas Pine Land Association, contract was entered into between the oil company and the Texas Builders Supply Company (Rec., pp. 225-227), and said supply company went into possession as the agent or contractor of the oil company, and continued to move sand therefrom up to and after the filing of this suit. The Texas Builders' Supply Company made a monthly report to the oil company of the number of cars of sand taken. All these reports were offered in evidence, and show a total of 2742 cars removed from October 1, 1902, to May 1, 1912. To show the continuous operation, we give the number of cars removed each year:

1902, 47 cars.

1903, 251 cars.

1904, 223 cars.

1905, 264 cars.

1906, 236 cars.

1907, 191 cars.

1908, 237 cars.

1909, 204 cars.

1910, 481 cars.

1911, 481 cars.

The first four months of 1912, 127 cars.

The photographs, Nos. 1, 2, 3 and 4, in evidence, and sent up with the Record, clearly show the extent of the operations. The continuity of the operations from 1902 up to the filing of this suit cannot be questioned. Back of that time there is some claim by defendants in error of short breaks therein, but this is denied by the plaintiffs in error's witnesses. We earnestly insist that when taken altogether, such operations were practically continuous from the time the G. B. & K. C. Railroad reached this land in the fall or winter of 1893 up to the filing of this suit. The deeds under which plaintiffs in error hold describe all the land in controversy. The Texas authorities are uniform that where a party claims a tract of land under a deed or deeds and he is in possession of a part of same, in person or by agent or tenant, such possession extends to all the land out of said tract described in his deed.

Coming now to the question of the three-year statute of limitation. Once the senior deed out of Charles A. Felder (Felder to Daniel, January 10, 1839), under which plaintiffs in error claim, is established, then plaintiffs in error have perfect title under the three-year statute of limitation; and there can be no question, under the evidence shown by this Record, that numerous periods of three

years' possession existed between 1893 and 1912 sufficient to satisfy such statute.

Ewing v. Burnet, 11 Peters, 41.
 Stafford v. King, 30 Texas, 259.
 League v. Rogan, 59 Texas, 427.
 Parker v. Baines, 65 Texas, 605.

Coming now to the five-year statute of limitation, which requires registration of deeds and payment of taxes, in addition to adverse possession, etc. This was the only issue submitted by the trial judge to the jury, but by refusing the special charges requested by plaintiffs in error, to the effect that the possession of the Texas Builders' Supply Company of Sand Pit F, whether such possession was or was not restricted to Sand Pit F, was sufficient, there was brought about the verdict of the jury against plaintiffs in error upon this issue. It is certain that this Record shows that all the deeds in plaintiffs in error's chain of title were registered. (Rec., 340-349-354-356-374-375-381.) Payment of taxes is shown from 1894 down to the filing of this suit. (Rec., pp. 387-388-389-390-391-264.) Plaintiffs in error claimed the land adversely to the world. The only question of fact submitted to the jury about which there could be any dispute under the evidence is, whether the Texas Builders' Supply Company was or was not restricted in its possession to the particular tract upon which its operations were carried on. Even if it be contended that the verdict of the jury is that such possession of said supply company was restricted, we insist that, restricted or not restricted, such possession is the possession of the plaintiffs in error, and, under the law, sufficient to base limitation title to everything included in the deed or deeds under which plaintiffs in error hold.

A full and able discussion of this subject will be found

in the opinion of the Honorable Circuit Court of Appeals of the Fifth Circuit, in this cause, reported in 213 Federal Reporter, p. 136, and in which certiorari was refused by this court. (234 U. S., 759.) Said opinion and the cases cited therein will be found helpful.

We also refer to:

Bowles v. Brice, 66 Tex., 724; 2 S. W., 729.

Puryear v. Friery, 40 S. W., 446 (writ of error refused by Supreme Court of Texas, 93 Tex., 693).

Haynes v. T. & N. O. R. R., 111 S. W., 427 (writ of error refused by Supreme Court).

Collier v. Coutts, 45 S. W., 485 (writ of error refused by Supreme Court).

City of El Paso v. Ft. Dearborn, 96 Tex., 496; 74 S. W., 21.

The leading case upon which defendants in error will probably rely is the case of Read v. Allen, 63 Tex., 154. Particular attention is called to the fact that in this case there is cited in support thereof Texas Land Co. v. Williams, 51 Texas, 51), and Cunningham v. Frandtzen (26 Tex., 34). An examination of these two cases last mentioned will disclose that, either by a contract or by usage thereunder, the owner of the land was excluded from the particular portion in possession. In Cunningham v. Frandtzen, the owner had sold and conveyed the particular tract under possession. In Texas Land Co. v. Williams, the landlord was excluded by usage under the contract from the tract in possession; that is to say, that the tenant was not engaged in any operation in which the landlord was in any way interested. The same may be said, so far as the opinion discloses, of the leases in Craig v. Cartwright (65 Tex., 413).

In the case at bar, the contract is akin to contracts much in vogue in Texas, where the owner of land fur-

nishes team and tools, board, etc., to another, who farms a tract of land under the direction of the owner—generally known in Texas, and probably in the entire South, as farming on the halves, or shares, as distinguished from contracts which provide for the payment to the owner of the land of a third or fourth or money rent. In these contracts of farming on the halves, the owner of the land is not excluded from the rented premises. Many of these contracts have been construed by the higher courts of Texas.

Tignor v. Toney, 35 S. W., 881.

Rogers v. Frazier, 108 S. W., 727.

Horseley v. Moss, 23 S. W., 1115.

The letters of Mr. A. W. Standing, General Manager of the oil company (Rec., pp. 747-748), were objected to by plaintiffs in error, and exceptions saved, as to their admission, and error assigned thereon. (Rec., pp. 947-950.) They were written after this suit was filed.

Railway Co. v. Robinson, 73 Tex., 277; 11 S. W., 327.

Waggoner v. Snody, 98 Texas, 512; 85 S. W., 1134.

Note particularly that the status of the parties as to limitation had become fixed at the date of writing these letters. The contracts had been in force since 1902 and 1903, respectively.

The Texas Builders' Supply Company had been in possession all that time, and operating thereunder.

But this question of restricted possession does not arise prior to the entering into the contract between the oil company and said supply company. As to the relations between the Texas Pine Land Association and the G. B. & K. C. Railroad prior to the acquisition of the property by the oil company, Mr. John H. Kirby says (Rec., p. 284):

"Q. Mr. Kirby, where was the G. B. & K. C. to take sand there under the contract between it and the Texas Pine Land Association? A. On the west side of the track; we could get it anywhere we chose; we always took it from the west side.

"Q. You mean they could go any place they chose on the Felder league and get sand? A. Yes, sir."

Eleventh and Twelfth Specifications of Error, as to Restitution of the Premises and Restoration of the Status Quo:

Our statement under specifications of error we believe sufficiently sets forth our contention.

We submit that upon the reversal of the judgment of December 2, 1912, the trial court should have granted plaintiffs in error's motion to have the premises restored to them, and also restitution of the moneys collected under said judgment; and further, that it was error to force plaintiffs in error to trial in this case without making such restitution.

Northwestern Fuel Co. v. Brock, 139 U. S., 216 (25 Law. Ed., 151).

Richard Gregg v. Robert Forsyth, 69 U. S., 56 (17 Law. Ed., 782).

Ex parte Morris and Johnson, 76 U. S., 605 (19 Law. Ed., 799).

Bank of U. S., v. Bank of Washington, 31 U. S., 8 (6 Peters, 8; 8 Law. Ed., 299).

Galpin v. Page, 85 U. S., 350 (21 Law. Ed., 959).

Robinson v. Alabama, 67 Fed., 189.

Hinchman v. Ripinsky, 202 Fed., 625.

Peticolas v. Carpenter, 53 Tex., 23.

Perry v. Tupper, 71 N. Car., 385.

We submit, also, that this court, upon the reversal of this cause, will either order restitution or will direct the

District Court of the Eastern District of Texas to forthwith order same.

In the following cases the rule that the appellate court has authority and power to, and will, enforce restitution was recognized:

Reynolds v. Harris, 14 Cal., 667.

Stenard v. Brownlow, 3 Munf. (Va.), 229.

Castle v. Duncan, 2 Serg. & R. (Pa.), 57.

We submit, further, that this court will enter an order directing defendants in error to restore the *status quo* of this property as it was at the time of filing of this suit. Motion for contempt filed in this cause and answer thereto show that all the pine timber has been cut from this land during the pendency of this suit by defendants in error, and those claiming under defendants in error, with the acquiescence of defendants in error, and that they have derived benefit thereof. The pine timber is by far the most valuable part of the property in litigation. We do not believe that this court will permit the subject-matter of the litigation to be thus removed, particularly when it is shown that 8,493,995 feet of said timber were removed since this court granted certiorari herein, and in violation of order of supersedeas granted by the District Judge.

Or that this court will receive the suggestion of counsel that such timber has been so cut pending this litigation, and will direct the United States District Court to inquire into said matter and require restoration of the *status quo* of the property involved in litigation.

Merrimac River Sav. Bank v. Clay Center, 219 U. S., 527.

United States v. Shipp, 203 U. S., 563.

In re McKenzie, 180 U. S., 536.

Foster v. Kansas, 112 U. S., 201.

Wilson v. North Carolina, 169 U. S., 586.

Tornanses v. Melsing, 106 Fed., 775.

Wartman v. Wartman, Taney 362, Fed. Cas. No. 17,210.

To the same effect are the Texas decisions, insofar as the question has been passed upon.

San Antonio St. R'y Co. v. State, 38 S. W., 54.

(Note: Writ of error was granted by the Supreme Court of Texas in this case, but in its opinion, 90 Tex., 521, the rule announced by the Court of Civil Appeals was not changed.)

G. C. & S. F. R'y Co. v. Ft. W. & N. O. R'y Co., 68 Tex., 98.

People's Cemetery Ass'n v. Oakland Cemetery Co., 60 S. W., 679.

The decisions of the courts of other States (many of them being cited with approval by Justice Lurton in the opinion in the Merrimac River case, 219 U. S., 527) are to the same effect.

State, *ex rel.* Morse, v. District Court, 29 Mon., 230 (74 Pac., 412).

Ex parte Kellogg, 64 Cal., 343 (30 Pac., 1030).

State, *ex rel.*, v. Pittsburg, 80 Kan., 710 (25 L. R. A., N. S., 226, 104 Pac., 847).

Penn. R. R. Co. v. Nat'l Docks and N. J. R. R. Co., 54 N. J. Eq., 654 (35 Atl., 433).

We respectfully submit this case, and ask that the judgment of the trial court and of the United States Circuit Court of Appeals be reversed and the cause remanded for a new trial, with suitable and appropriate orders for res-

titution and for the restoration of the *status quo* of the property as hereinbefore set forth.

Respectfully submitted,

WILLIAM L. MARBURY,
OSWALD S. PARKER,
THOMAS M. KENNERLY,

*Attorneys for Plaintiffs in Error, Houston
Oil Company of Texas, Kirby Lumber
Company, and Maryland Trust Com-
pany.*

MARBURY, GOSNELL & WILLIAMS,
HEAD, DILLARD, SMITH, MAXEY & HEAD,
PARKER & KENNERLY,

Of Counsel.

Appendix "A."

NOTARIES PUBLIC

Date of App.	Names	Where	Remarks
	John Alexander New-lands	Harrisburg	Superseded
	W. Fairfax Gray	"	Term expired 23 Jan'y 41 Apd 23d Jan'y '39
1839			
Jan. 1	John Sharpe	Velasco	Dead Appd 8 Jan. '39
" "	Danl J. Toler	Washington	Ex Officio Resigned Appd 8 Jan. '39
" "	Wm. H. Daingerfield	Bexar	out not commd Appd 8 Jan'y '39
" "	P. P. Helton	Galveston	Commis'd. 12 Jan'y '39 (out) Appd 8 Jan. '39 re- signed
" 23	Thomas Harvey	Matagorda	Comd. Jan. 25-39 dead Apd. 23 Jan. '39
" 23	Samuel A. Roberts	County Harrisburg	Comd. Jan 28 '39 out Apd. 23d Jan'y '39 re- signed
" 28	David J. Holt	County of Brazoria	Comd. same date recess appt. Confirmed 21 Nov. 1839
Feby. 1	Timri W. Eddy	Jefferson Cy.	Comd. same date recess appt. Confirmed 23 Nov. do do do do
" "	George A. Patillo	Jasper	Confirmed Nov. 21, '39
" "	Nicholas Griffith	Galveston	Comd. same date recess appt. out. resigned 10th March 41
" 11	Gwin Morrison	Montgomery Co.	do do Confirmed Nov. 25 '39
Mar. 11	William G. Lewis	Liberty County	Comd same date do Null
" 29	Joel T. Case	Refugio Cy.	Arandas same date out
May 1	George W. Adams	Harrisburg Cy.	out same date Confirmed 25 Nov. '39
" 13	William Myers	Jasper Cy	same date Confirmed Nov. 21 '39
" 29	William Byrne	Refugio Cy.	Com same date Confirmed Nov. 25 '39
July 1	John S. Evans	Galveston	dead Com same date Confirmed Nov. 21

Nov.	3	Samuel P. McFarland	Jasper	Com same date out
	21	H. W. Ludduth	Jasper	Com same date Confirmed Nov 21 gone to Mexico Com same date
	29	J. H. Winchell	Bexar	Confirmed Dec. 7
Dec.	7	John Hayden	Bastrop	out Com same date Confirmed Dec. 7
	7	Joseph Moreland	Bastrop	out Com same date Confirmed Dec. 7
1840				
Jany.		Thos. C. Bunker	Sabine City Jefferson Co.	Confirmed and Com Jany 4th, 1839
Feb	11	Joseph Moreland	Notary Public Travis County	Resigned Nov. 1st confirmed 20th Nov.
	25	James Norton	Matagorda County	(dead)
	29	Thomas G. Gordon	Travis County	Confirmed No. 16th dead.
Date of Com.		Name	Where	Remarks
1840				
Mar.	5	Joseph W. McClurg	Colorado County	confirmed 20th Nov. 40
	16	James B. Johnson	San Augustine County	rejected Nov. 16th 40
	30	Thos. Dillard	Robertson County	confirmed 31st Jany 40
	30	James P. Cole	Galveston County	confirmed 20th Nov 40
May	6	Cornelius Sane	Victoria County	confirmed Nov. 16th 40
Sept.	1	Peter McGreal	Port of Velasco Brazoria Cy.	confirmed 20th Nov. 40 Resigned 20th Feb. 40
	8	Theodore Grabeau	Port of San Luis Brazoria Cy.	confirmed No. 16th
Nov.	17	Thos. Wm. Ward	Travis County	confirmed Nov. 11th.
1841				
Jan.	22	Wellington Donaldson	Port Calhoun	confirmed 22d Jan. 41
"		Robert M. Forbes	County of Brazoria	do " " "
"		Willard Richardson	County of Refugio	do " " "
	25	Thomas Harvey	County of Matagorda	do 18th Jany
Feb.	5	Henry F. Fisher	County of Harris	do 5th Feby
"	"	John Hamilton	County of Jasper	do do
Mar.	6	Ira M. Freeman	Notary Public Houston County	Conf'd. Nov. 20
	15	Wm. H. Austin	do " Port San Luis	

May 11	Chas. B. Stewart	do	“	Montgomery Cy. Cond	Nov. 20
June 8	Robert Rose	do	“	Galveston County	
11	John W. Smith	do	“	Bexar County Confd	Nov. 20
July 12	William O. Connell	do	“	Bastrop County	
Aug. 26	Wm. F. Johnson	do	“	Matagorda	
1842	Name	Office	County	Date of Confirmation	
Jan. 18	Thompson H. McMahan	Notary	Fort Bend County	18th Jan 42	
“	J. W. Brooks	“	Brazoria	“ “ “ “	
“	B. F. Clement	“	“	“ “ “ “	
Feb. 2	Geo. W. Scott	“	Shelby	“ “ “ “	

1842	Date of	Commission Name	Office	County	Date of Confirmation
Feb. 4		Saml. P. McFarland	Notary	Jasper County	3d Feby
“		D. Laughlin	“	Travis	“ “ “
“		William Herring	“	Jefferson	“ “ “
“		Ames Morrill	“	Red River	“ “ “
“		Thos. Crutcher	“	Bowie	“ “ “
“		W. D. Shelton	“	Harrison	“ “ “
“		John S. Menifee	“	Jackson	“ “ “
“		George Lane	“	Panola	“ “ “
“		James S. Sullivan	“	Ward	“ “ “
5		Francis M. Weatherhead	“	Sabine	4th Feby
“		Alex. E. McClure	“	Burnet	5th Feby

DEPARTMENT OF STATE.

I, John G. McKay, Secretary of State of the State of Texas, do hereby certify that the foregoing is a true and correct copy of a list of notary publics appointed for the various counties of the State of Texas during a period beginning January 1st, 1839, and ending February 5, 1842, as same appears of record in executive record No. 255, pages 166, 167 and 168, inclusive, of this department.

IN TESTIMONY WHEREOF I have hereunto signed my name officially and caused to be impressed hereon the Seal of State at my office in the City of Austin, this the 27th day of March, A. D. 1916.

(SEAL)

(Sgnd.) JOHN G. MCKAY,

Secretary of State.

10

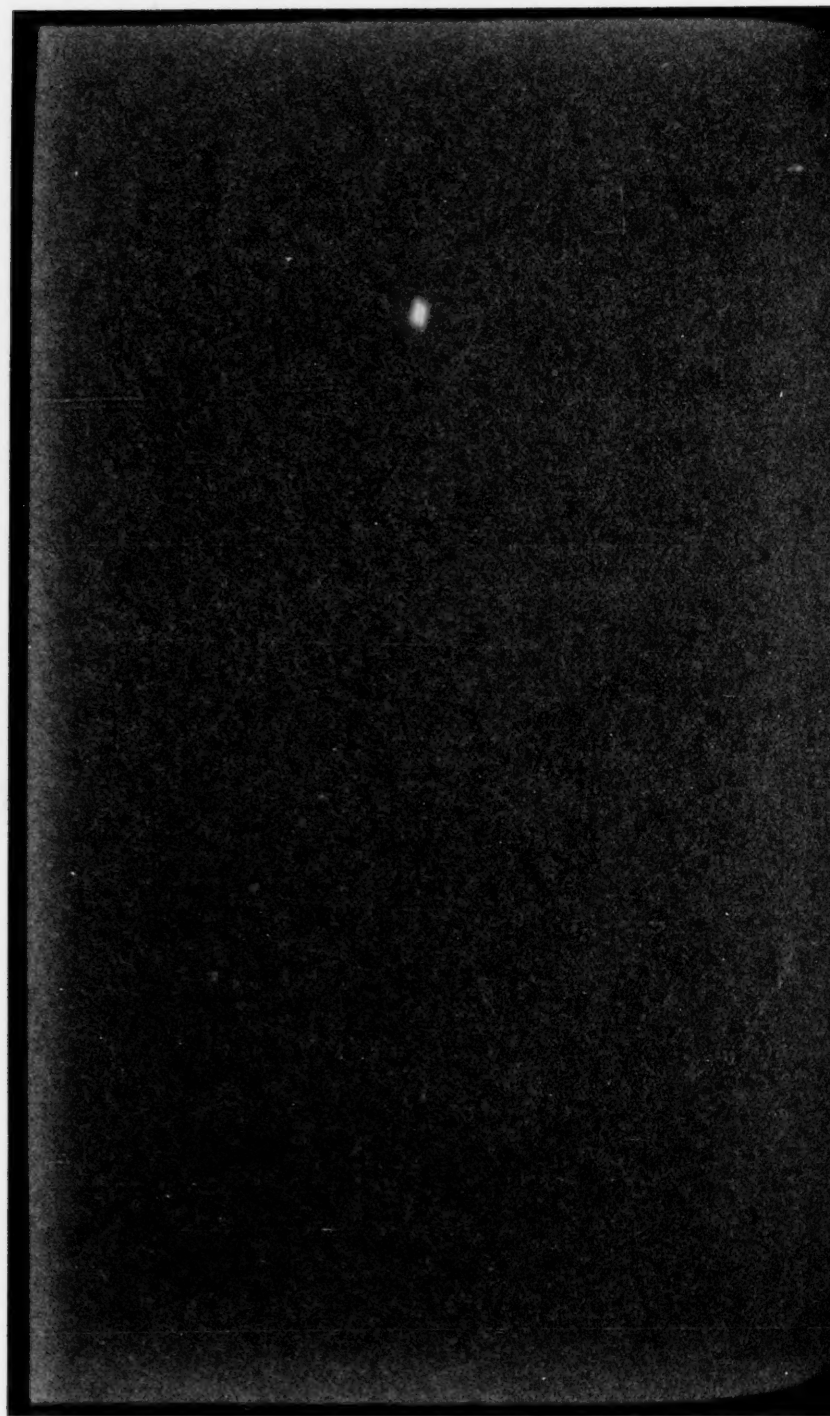
FILED
MAY 14 19
U. S. NA

Supreme Court of the United States

HONORABLE CHIEF JUSTICE

WILLIAM J. BROWN

RECEIVED MAY 14 19



SUBJECT INDEX.

	Page.
Answer to Respondents' Allegation That Controversy Herein Is of a "Purely Private Nature"....	1 to 4
Answer to Respondents' First Point:	
Description in Deed Felder to Daniels.....	4 to 6
The Claim That William Myers, Who Took the Acknowledgment of the Deed From Felder to Daniels Was Not a Notary Public....	6 to 9
The Force and Effect of the Menard Record Admitted in Evidence By the Trial Court and the Deed From Felder to Daniel Thereon....	9 to 20
Answer to Respondents' Second Point:	
The Claim That Petitioners Do Not Deraign Title Under the Deed From Felder to William A. Daniel	20 to 21
Answer to Respondents' Third Point:	
The Purported Claim Under the Purported Deed From Felder to Veatch Under Which Respondents Claim	21 to 28
Answer to Respondents' Fourth Point:	
Respondents Claim That the Deed From Felder to Daniel, Under Which Petitioners Claim, Was a Forgery	29 to 33
Answer to Respondents' Fifth Point:	
The Claim That the Deed From Felder to Daniel Was Not Recorded in Liberty County, and That Even if Recorded Same Would Not Be Notice to Veatch	33 to 35
Answer to Respondents' Sixth Point:	
The Claim That There Is No Evidence to Show That Veatch Was Not an Innocent Purchaser for Value Without Notice of the Daniel Deed	35 to 36
Answer to Respondents' Seventh Point:	
The Claim That the Evidence Did Not Justify the Submission to the Jury of the Issue of the Forgery of the Deed From Felder to Veatch, Under Which Respondents Claim....	36 to 37

SUBJECT INDEX—Continued

	Page.
Answer to Respondents' Eighth Point:	
The Claim That the Three Years Statute of Limitation Is Not Applicable.....	37 to 38
Answer to Respondents' Ninth Point:	
The Contention That the Doctrine of the Law of the Case Prevents This Court From Determining the Questions Presented.....	38
Conclusion	39

LIST OF AUTHORITIES CITED

	Cited on Page.
Ass'n v. Heady, 50 S. W., 1079; 57 S. W., 583.....	7
Act of May 15, 1838 (Laws of 1838, p. 10; Gammel's Laws of Texas, Vol. 1, p. 1480).....	7
Act of June 12, 1837.....	8
Act of February 5, 1841, Sec. 20 (Laws of 1841, p. 168; Gammel's Laws of Texas, Vol. 2, p. 632).....	13
Act of February 9, 1860, Secs. 2 and 3 (Act of 1860, Gammel's Laws of Texas, Vol. 4, p. 1437).....	14 and 15
Bank v. Dandridge, 12 Wheaton, 64.....	7
Butler v. Dunagan, 19 Tex., 558.....	11
Beaumont Pasture Co. v. Preston, 65 Tex., 448.....	16
Belcher v. Fox, 60 Tex., 527.....	19
Cannon v. Cannon, 66 Tex., 682.....	7
Deen v. Wills, 21 Tex., 642.....	7
Houston Oil Company v. Kimball, 103 Tex., 103.....	20
Johnson v. Taylor, 60 Tex., 360.....	7
Kelly v. Sanders, 99 U. S., 441.....	7
McKissick v. Colquhoun, 18 Tex., 148.....	7
Panama Railroad Co. v. Napier Shipping Co., 166 U. S., 280; Law. Ed., p. 1005.....	37 and 38
Thompson v. Johnson, 84 Tex., 548; 19 S. W., 784.....	9

No. _____

IN THE
Supreme Court of the United States

HOUSTON OIL COMPANY OF TEXAS, Et AL.,
Petitioners,

vs.

CORNELIA G. GOODRICH, Et AL.,
Respondents.

PETITIONERS' REPLY TO RESPONDENTS'
MOTION TO AFFIRM

We assume that this Court will look to the record to determine whether it has been misrepresented as has been charged.

The Respondents' excuse for failure to reply to the Petition for Certiorari is that they supposed that the controversy herein was purely of a private nature.

When you reflect that Menard County included territory about as large as the State of Delaware, and that, by requirement of statute, supposed at the time to be valid, deeds and other instruments involving property worth thousands of dollars were placed of record in the office of the Clerk of said county. And that the validating act, passed by the Congress of Texas in 1844 (after it had been held by the Courts that the Act creating said county was irregular), which has been recognized by the Courts and Bar of Texas as fully validating said records, is held by the Circuit Court of Appeals to be inoperative as to a very large portion of such records, it is remarkable that anyone should suppose that the question was one of a purely private nature. Add to this that the decision of the Circuit Court of Appeals is contrary to numerous decisions of the higher Courts of Texas, it would seem difficult for a question of this particular character to arise that would affect larger property rights or a greater number of people.

Counsel for Petitioners state, and we believe we have a right to so state, that since the publication of the decision of the Circuit Court of Appeals in the Advance Sheet of the Federal Reporter, they have had numerous requests from members of the Bar representing owners of land situated in old Menard County for copies of their brief in this case, and also for copies of their Petition for Writ of Certiorari—in fact, more requests than counsel have been able to supply. In the main, these requests have been verbal and have indicated the interest of such attorneys and their clients in the questions involved herein. One of these requests

for copies of brief came from Messrs. Baker, Botts, Parker & Garwood, of Houston, Texas, probably representing more and larger property interests in the territory mentioned than any other firm of lawyers in the State, and was followed by a communication from them written prior to the submission of our Petition for Certiorari, which we take the liberty of quoting:

“BAKER, BOTTS, PARKER & GARWOOD
Commercial Bank Building

James A. Baker
Edwin B. Parker
H. M. Garwood
Jesse Andrews
C. R. Wharton
C. L. Carter
J. H. Tallichet
Thomas H. Botts
John C. Townes, Jr.
Walter H. Walne
W. A. Parish
R. C. Patterson
Stephen H. Philbin
Ralph B. Feagin

“Houston, Texas, Jan. 12, 1916.

“Houston Oil Co. vs. Goodrich.

“Messrs. Parker & Kennerly,
City.

“Gentlemen:—

“We thank you very much for sending us the briefs in the above case. We have clients who have large interests in Tyler County and the question of the status of the Menard County records is one of importance to them. If these records are not competent evidence under the law as it exists today, then legislation should be secured validating these records and providing for the use thereof in evidence.

“We will give this matter further consideration and communicate with you again concerning same.

“Yours truly,

(Signed) “Baker, Botts, Parker & Garwood.”

Interest is particularly shown in the inference that is drawn from the opinion of the Circuit Court of Appeals, that when such records themselves (as distinguished from a certified copy of the records under the statutes) are offered as a circumstance, to show the execution of a deed, under which claim has been made for more than half a century, they do not present a case entitling the party to go to the jury upon the issue of the execution of such deed. It is clear that if the decision of the Circuit Court of Appeals is the law, much litigation will result, and titles for years considered not open to attack will become unsettled.

Respondents' motion supports rather than weakens our position that Petitioners have been deprived of their Constitutional right of trial by jury. And it is admitted in substance, that the allegations contained in Petition for Certiorari are sufficient to entitle Petitioners to the relief which has been granted them, and for the further relief for which they are praying, but Respondents claim that such petition does not correctly reflect the facts. This we now proceed to discuss.

ANSWER TO RESPONDENTS' FIRST POINT.

Description in Deed Felder to Daniels.

No objection predicated upon the description in this deed was made by Respondents to the admission in evidence of the Menard County record containing the record of said deed. (Rec., p. 342.) The complaint is for the first time made here.

Save and except that in the field notes in the original grant to Felder (Rec., p. 65) the corners are partly identified by bearing trees, the field notes in this deed are identical with those in such original grant. Add to this that it is a notorious and historical fact that George A. Nixon was Commissioner of the Mexican Government for the purpose of granting lands to immigrants in Zavala's colony, and bearing that fact in mind, a careful reading of the balance of the description makes it clear that what is intended to be conveyed is the league of land granted by Nixon as Commissioner to Charles A. Felder, August 29, 1835 (this being the date of the grant to Felder). And this is further aided by reference to the Land Office Records showing the grant.

But even if subject to the criticism insisted upon by Respondents, the description in the deed covers the league of land in Zavala's colony; the Felder league was located in Zavala's colony. The description in the deed covers the league of land on the west bank of the Neches River; the Felder league was located on the west bank of the Neches River. The description in the deed covers fifteen labors of arable land and ten labors of grazing land; such was the description of the Felder league. The description in the deed refers to a grant dated August 29, 1835; that was the date of the grant to Felder. The deed purports on its face to be the act of Charles A. Felder, is signed by Charles Felder, and was acknowledged before the officer by Charles A. Felder.

And whether this deed under which Petitioners have been claiming for seventy years covered the Felder league and was intended to convey the Felder league,

was a question of fact to be determined, not by the Court, but by the jury.

It may be added here, as we have urged in our petition for certiorari and brief in support of same, that James Morgan, the ancestor of those Respondents who recovered the judgment in the Court below, lived in the vicinity of this land and in the vicinity of the place of record of the deed for twenty-five years after the deed went to record, and there is no evidence that he, who of all persons was perhaps most familiar with the facts, ever questioned or disputed that this deed described and covered the Felder league. And Respondents raise the question for the first time in this Court, seventy-seven years after the execution of the deed, during which time there has been active claim thereunder, as stated.

**It Is Claimed That William Myers,
Who Took the Acknowledgment of
the Deed From Felder to Daniels
Was Not a Notary Public.**

Had this question been raised by James Morgan, the ancestor of Respondents, during his lifetime, or even if the suit which was instituted by Morgan's executors (Rec., 330 and 331) after his death (and which such executors did not prosecute, but suffered to be dismissed) had been prosecuted, this question could then have easily been determined. At that time the records of Jasper County, which would have shown whether or not William Myers was a Notary Public, or was an associate Justice of the County Court and therefore an ex-officio Notary, were intact; now they are no longer in existence, having been destroyed by fire. At that time

doubtless numerous witnesses could have been found who knew William Myers, and knew whether he was a notary. Myers himself was probably living. James Morgan most surely knew the facts and he never raised this question. At this late day no direct testimony can be had upon the question for the reasons stated.

From the fact that Myers acted as a Notary Public, it is presumed that he was legally appointed or elected to that office, and that he was legally acting.

Bank v. Dandridge, 12 Wheaton, 64;

Keely v. Sanders, 99 U. S., 441;

McKissick v. Colquhoun, 18 Tex., 148;

Deen v. Wills, 21 Tex., 642;

Cannon v. Cannon, 66 Tex., 682.

In Texas the act of a notary in taking an acknowledgment is regarded as a quasi judicial act.

Johnson v. Taylor, 60 Tex., 360;

Ass'n v. Heady, 50 S. W., 1079; 57 S. W., 583.

It was, therefore, necessary for **Respondents** to overcome the presumption that Myers was a notary public at the time he took this acknowledgement. To do this they must produce evidence such as will negative every fact from which it could be reasonably deduced that Myers was such notary. Does the purported compilation from the office of the Secretary of State (Rec., pp. 366-370) do this? It is only necessary to examine such compilation. The Act of May 15, 1838, in force at the date of this acknowledgment (Laws of 1838, p. 10, Gammel's Laws of Texas, Vol. 1, p. 1480), is as follows:

"Be it enacted by the Senate and House of Rep-

representatives of the Republic of Texas, in Congress assembled, That there shall be appointed for the county where the seat of government is or shall be located two notaries public, in addition to the chief justice of said county ; **and, also, one additional notary in each county of the Republic**, which appointments shall be made by the President, by and with the advice and consent of the Senate."

An examination of the certificate attached to the compilation from the office of the Secretary of State (Rec., p. 370) shows that it purports to be a true and correct copy of a list of civil officers of Jasper County, Texas, for the years 1839 to 1842, inclusive, etc. Clearly, therefore, it does not include nor purport to include a notary who may have been appointed in 1838 by the President under said Act of Congress. An examination of the compilation itself shows that a notary public for Jasper County is not mentioned. Again, stress is laid upon the fact that such compilation shows that there was a William Myers who was Clerk of the District Court of Jasper County, and it is argued that he could not have held both offices. The Court cannot presume that he was the William Myers who, as notary public, took this acknowledgment, and there is no proof. There could have been two or more men by that name.

Again, the certificate shows that a William Myers was a Justice of the Peace of Jasper County, elected a short time before this acknowledgment was taken. Section 1 of the Act of December 20, 1836, in force in 1839, provides for the selection in each county, by the Justices of the Peace of such county, of **two of their number**, to be Associate Justices of the County Court. The Act of June 12, 1837, in force in

1839 (Act 1837, p. 273, Gammel's Laws of Texas, Vol. 1, p. 1333) is, as follows:

"Be it enacted by the Senate and House of Representatives of the Republic of Texas, in Congress assembled, That in cases in which the chief justice of the County Courts may be interested, and in case of the absence or inability of the chief justices to act, the associate justices of the County Court shall be authorized to act as judges of probate; **and either of the said associate justices may act as notary public in such cases, and during such period.**"

It is clear that Wm. Myers as Justice of the Peace was elected Associate Justice of the County Court and was qualified to **act as Notary** and had the powers of the Chief Justice who indisputably was authorized to take acknowledgments.

Numerous further suggestions along this same line could be made, but the above is sufficient to show that the assertion that William Myers was not a notary public of Jasper County at the time he took the acknowledgment to this deed is wholly unfounded. If not a de jure officer, William Myers was a de facto officer, and it is settled beyond question in Texas that a de facto officer may take an acknowledgment.

Thompson v. Johnson, 84 Tex., 548; 19 S. W., 784.
**The Force and Effect of the Me-
 nard Record Admitted in Evidence
 by the Trial Court and the Deed
 From Felder to Daniel thereon.**

Respondents in their discussion entirely fail to distinguish between the **effect** that should be given this

record, containing this deed which was **admitted** in evidence by the Trial Court, and the offer in evidence by Petitioners of a certified copy of such record under the Texas Registration Statute which was excluded by the Trial Court.

They say that they will undertake to show that the copy of that deed found on the books of Menard County was of no more effect than if such copy had been found "on the fly-leaf of some man's family Bible." If accompanied by possession, acts of ownership, payment of taxes, and active claim thereunder for seventy years, we say that a deed upon a family Bible—coming from the proper custody and bearing upon its face evidence of age and other evidence of authenticity—would be admissible in evidence as a circumstance to establish the fact of the execution of that deed. But we are not driven to that here. Menard County was created by Act of the Texas Congress, a Clerk or Registrar was appointed, he opened up books for the recording of deeds, and people were required by law to lodge their deeds and other papers with such Clerk for record. He recorded them. It was under these circumstances that the deed from Felder to Daniel was recorded. The validating Acts of 1841 and 1844, to which we shall hereafter refer have been considered by the Courts and legal profession in Texas practically since their enactment, to be sufficient to validate the Menard Records. But if it be admitted (which, of course, we do not) that the record of this particular deed was not validated by such Acts, Petitioners were entitled to go to the jury upon the circumstance of the deed being found of record upon such public record under which Petitioners

have asserted long active claim, as above set forth. Respondents do not answer this contention and have never done so.

But we insist that the Menard record is a valid record, and that the decision of the Circuit Court of Appeals is directly contrary to the decisions of the higher Courts of Texas.

In discussing the Act validating the Menard records, passed in 1844 (copied at pp. 34-35 of Petitioners' petition for certiorari and brief in support of same), the Circuit Court of Appeals holds that such validating Act does not apply to this deed, because same was acknowledged before a notary public, an officer at that time not authorized to take such acknowledgments. It likewise holds that the Act of 1841, validating all acknowledgments theretofore taken before Notaries and other unauthorized officers, does not cure this acknowledgment because this deed was not properly of record, in that Menard County was not a legal county. This holding is in direct conflict with the decision of the Supreme Court of Texas in *Butler v. Dunagan* (19 Tex., 558). In that case the instrument in question was dated July 14, 1836, and was acknowledged before a Primary Judge. This instrument was **not of record** when the Act of 1841 was passed, and the Supreme Court says:

"Wheeler, J. Although it is not so stated in the bill of exceptions, there can be little doubt that the copy of the power of attorney was excluded on the ground that the original was not properly authenticated to admit it to record. Under the act of the 5th of February, 1841 (Hart. Dig., Art. 2777), the proof of handwriting may not have been sufficient,

not being made by a subscribing witness. But the power of attorney was acknowledged by the maker before a primary judge, who was ex officio a notary public (Act of the 20th of January, 1836, Sec. 4, Laws of the Provisional Government), and that, we think, was sufficient to admit it to record, under the act of 1841, without other acknowledgment or proof. If it had been recorded upon that acknowledgment, before the act of 1841, it would have come clearly within the provision of the 20th section of the act. Hart. Dig., Art. 2776. In terms, the 21st section applies to instruments thereafter to be made and recorded; but we do not think a literal construction would give effect to the act according to its spirit and intention. If, when presented for record, the deed had been duly acknowledged before the proper officer, it could make no difference whether the acknowledgment was made before or after the passage of the act. If acknowledged before, it could not have been intended that the acknowledgment should be again repeated. The act was intended to remove objections to the sufficiency of the registry of deeds, upon such acknowledgments, and to provide for their recording in future. It was a healing and enabling statute, and ought to be construed liberally. To exclude this instrument from its operation because acknowledged before its passage, where, if before recorded upon the same acknowledgment, it would have been within its operation, would be an extremely narrow and strict construction, and such an one as, in our opinion, would not be in harmony with the legislative intention and the manifest spirit and intention of the law. We think, therefore, the instrument was sufficiently authenticated to admit it to record."

The effect of the validating Act of 1841 upon the

deed from Felder to Daniel, which deed had not at that time been recorded in Menard County (but had, as we claim, been recorded in Liberty County) was under the rule laid down in the above case, to fully validate the acknowledgment thereof before the said William Myers, Notary Public. So that when it was thereafter spread upon the Menard records, it was of the same force and effect as if it had been originally acknowledged before an officer authorized **at the date** of said acknowledgment to take same. And when the Act of 1844 was passed, validating the Menard records, it had the effect of validating this deed, because this deed was properly upon the Menard records.

Section 20 of the Act of February 5, 1841, referred to (Laws of 1841, p. 168, Gammel's Laws of Texas, Vol. 2, p. 632) is, as follows:

"Be it further enacted, That any grant, deed or instrument for the conveyance of real estate, or personal, or both, or for the settlement thereof in marriage, or separate property or conveyance of the same in mortgage, on trust to uses, or on conditions, as well as any and every other deed or instrument required, or permitted by law to be registered, and which shall have been heretofore registered, shall, **from the passage of this act, be held to have been duly registered, with the full effects and consequences of the existing laws; provided, the same shall have been acknowledged by the grantor or grantors, maker or makers, before any chief justice of the County Court, or before any notary public, or before the clerk of the County Court, in whose office such record is proposed to be made, or proved before such officer by one or more of the subscribing witnesses, and certified**

by such officer; any obscurity or conflict in the existing laws to the contrary notwithstanding."

And the Circuit Court of Appeals entirely overlooks and ignores the force and effect of the validating Act of 1841, when applied to the record of the deed from Felder to Daniel in Liberty County. The records of Liberty County were not destroyed until 1874, hence were in existence in 1841, when this validating Act was passed; and if, as we earnestly insist and as we believe we have fully shown, this deed was then of record in Liberty County, the effect of the Act of 1841 would be to fully validate same, if in fact, any validation was necessary.

But whatever may be said regarding such validating Acts of 1841 and 1844, there is no escape that the validating Act of February 9, 1860 (p. 75 of the Act of 1860, Gammel's Laws of Texas, Vol. 4, p. 1437) had the effect of validating this deed. Sections 2 and 3 of the Act of 1860 are, as follows:

"Sec. 2. That any grant, deed or other instrument of writing for the conveyance of real estate or personal property or both, or for the settlement thereof in marriage, or separate property, or conveyance of the same in mortgage, or trust to uses, or on conditions, as well as any and every other deed or instrument required or permitted by law to be registered, and which shall have been heretofore registered or recorded, shall be held to have been lawfully registered, with the full effect and consequences of existing laws. Provided, the same shall have been acknowledged by the grantor or grantors before any Chief Justice or Associate Justices or Clerk of the County Court or Notary

Public in any county within the late Republic or the now State of Texas, or Judge of the Department of Brazos, or any primary Judge or Judge of the first instance in 1835 or 1836, or proven before any such officer, by one or more of the subscribing witnesses thereto, and certified by such officer, whether such acknowledgment or proof shall have been made before any such officer of the county where such instrument should have been recorded or not.

"Sec. 3. That all such instruments which shall have been acknowledged or proven before any officer named in the foregoing section of this act, and which shall have been afterwards recorded in the proper county, or certified copies thereof shall be evidence in the Courts of this State, as full and sufficient as if such acknowledgment had been taken, or proof made in accordance with existing laws. This act shall not be so construed as to effect or bind in any manner, any person or party, with constructive notice of the existence of any deed, or other instrument of writing as a recorded deed or instrument, except in the future, and after the taking effect of this act, unless such person or party would have been so affected, or bound with such notice, had this act never been passed."

Note the language used, that all deeds, etc., which "shall have been heretofore **registered or recorded** shall be held to have been **LAWFULLY REGISTERED**, with the full effect and consequence of existing laws." Then follows a provision that such instruments must be acknowledged before a notary public or other officer, etc., the meaning being that if there is found upon record, whether a legal record or otherwise, or found registered, a deed which has been acknowledged before a

notary public, etc., that such deed shall be held to have been **lawfully** registered, with the full effect and consequence of existing laws.

The Texas Courts hold that validating statutes must be liberally construed.

Beaumont Pasture Co. v. Preston, 65 Tex., 448.

So that we say that it is shown in this case beyond controversy that the Menard record was a valid record, but whether it was such a valid record as would permit the offering in evidence under the statute of a certified copy thereof is of no importance here, because as stated the **record itself** was produced, offered, and **admitted** in evidence, **and was sufficient when taken in connection with a long claim thereunder to require the submission to the jury of the issue of the execution of said deed.**

But Respondents say that the Menard Record is only a circumstance tending to show that such a paper once existed, and that whether it was a genuine instrument executed by Felder to Daniel must be shown by other evidence. At page 10, Respondents say in discussing whether such fact has been shown by other evidence, that it is not the acts and conduct of those claiming the land many years afterwards which should be considered and which would throw light upon the subject, but the acts and conduct of the parties about the time of the execution or alleged execution of the deed. They then proceed to argue that the deed from Felder to Daniel, under which there has been active claim for more than seventy years, was not executed, because they say that eight days later said Felder executed the deed, under

which Respondents claim and which has been attacked herein as a forgery, to John A. Veatch. We will discuss in its proper place the question of the forgery of the Veatch deed, the signature to which bears no resemblance to the original signature of Felder in his application for his grant, the names of the witnesses to which being written in the same handwriting as the name Charles A. Felder, and the most diligent inquiry failing to disclose anybody who had ever heard of the purported witnesses to the Veatch deed.

We are also inclined to the view that the acts and conduct of the parties about the time the deed was executed throw much light upon this issue. Veatch conveyed to James Morgan, the ancestor of Respondents. Morgan lived in the vicinity of the land and of the place of record of the deed from Felder to Daniel for twenty-five years, and never raised the questions which his grandchildren (a part of the Respondents) are raising here. Morgan's executors brought suit after his death to recover this league of land, and, although they were acting in a fiduciary capacity, did not prosecute the suit, but allowed it to be dismissed for want of prosecution.

It is claimed that William A. Daniel, to whom Felder conveyed, was dead at the date of the deed from Daniel to Word under which Petitioners claim, and that the deed from Daniel to Word was executed by another Daniel. The most that can be said for Respondents is that this was a question of fact which should have been submitted to the jury, and Petitioners were by the action of the Court deprived of the right to go to the jury.

The claim, however, that the deed to Word was not executed by the William A. Daniel to whom the land was conveyed by Felder is wholly unfounded. It is true that a witness residing off in another State, thousands of miles from the land in controversy, and who had never lived in Texas, did not know any of the parties concerned, testified that someone by the name of William A. Daniel, whom he claimed to know, died, before the date of the deed from Daniel to Word. The record in this case shows that Thomas J. Word was one of the leading citizens of Texas during his lifetime. Soon after he purchased this tract of land he conveyed a half interest therein to Susan F. Moore, wife of Judge George F. Moore, of the Supreme Court of Texas. Word testified that he took deed from Daniel, whom he found holding in trust for David Brown, Word having purchased this tract of land from the daughter of David Brown. To argue, therefore, that the Daniel from whom Word took the deed and under whom Word and Judge Moore held was not the man to whom Felder conveyed is to argue that Word and Judge Moore, whose character and reputation in the State of Texas has never been questioned, deliberately perpetrated a fraud by taking a deed from a man who was not the owner of the property. There is no escape from this.

And if it be true, as is necessarily charged, that Word and Judge Moore were perpetrating a fraud in taking a deed from one not the owner, there can be no escape that James Morgan, the ancestor of Respondents, knew that fact. He was living at the time in the vicinity; he held under the alleged deed from Felder to Veatch; he knew of the active claim of Word and Moore to the

property, and it is only after seventy years, and after the property has become valuable, and after the witnesses have died, and after the records have been destroyed, that these Respondents—suddenly awakened and urged into activity by some influences not apparent upon the face of the record—now claim that the Daniel to whom Felder conveyed, and the Daniel who conveyed to Word were separate and distinct individuals.

They argue that William A. Daniel did not claim nor assert any acts of ownership. If we were to concede that the record so shows, it is explained by the fact that the property was the property of David Brown and not William A. Daniel. Word purchased from and paid the consideration to the daughter of David Brown, and for a nominal consideration took a conveyance from Daniel, who held in trust for Brown.

Respondents present a novel question. In one breath they assert that the deed from Felder to Daniel is a forgery, in the next breath they claim that Daniel did not claim under the deed and exercised no acts of ownership thereunder.

Whatever may be the state of the record as to Word's particular testimony on the point that he found that Daniel was holding for David Brown, it is undisputed that Word purchased the property from the real owner, the daughter of David Brown, paid her the consideration, taking deed from her, which deed was offered in evidence; and the fact that he took additional deed from Daniel clearly shows that Daniel was not holding for himself but for David Brown.

Respondents do not quote all of the opinion in Belch-

er v. Fox (60 Tex., 527, but the part quoted shows that there was no active claim under the deeds which were sought to be offered in evidence. Yet at p. 530 of the opinion in that case, it is said:

"As the judgment will have to be reversed comment will not be made upon the evidence; at another trial, with such additional evidence as may be offered, **it may be proper to let the deeds go before the jury for their consideration.**"

It will be observed that in *Houston Oil Company v. Kimball* (103 Tex., 103), referred to by Respondents, there was no such question as we have here of the refusal of the Trial Court to submit the issue to the jury, and Respondents can point to no Texas case where the facts are as we have them here, of an active claim for more than half a century under a deed of record, and the refusal to allow the question of its execution to be submitted to the jury was upheld by the higher Courts.

ANSWER TO RESPONDENTS' SECOND POINT.

The Claim That Petitioners Do Not Deraign Title Under the Deed From Felder to William A. Daniel.

We have already discussed this question. The explanation of why the deed from Daniel to Word was a quit claim deed is, as stated, because Daniel held in trust for David Brown and not for himself, as is clearly shown by the undisputed evidence and there was no occasion for other than a quit claim deed. We believe that it is only necessary to refer to our quotation of the evidence as to payment of taxes, claim of ownership, etc., by

each party as contained in our original brief (pp. 36 to 50) in support of petition for certiorari, without repeating same here.

ANSWER TO RESPONDENTS' THIRD POINT.

The Purported Claim Under the Purported Deed From Felder to Veatch Under Which Respondents Claim.

In addition to what we have said in our original brief in support of the petition for writ of certiorari, we desire to say, that all of Respondents' suggestions, present only questions of fact that should have gone to the jury. The so-called original deed from Felder to Veatch when produced was so covered with suspicion of being spurious as to impress any fair-minded juror. It purports to be witnessed by two men—W. B. Barnett and Samuel Palmer—and the most diligent inquiry of old citizens failed to develop any one who had ever heard of them. And the most diligent investigation of the records of counties (deed, marriage and even the mark and brands of cattle) in the vicinity where they are claimed to have resided showed no trace of any such persons having ever lived in that vicinity. Nobody in the case has ever insisted that the name Charles A. Felder signed to the Veatch deed, bears any resemblance to the bona fide signature of Felder in the office of the Land Commissioner, where he made his application for this league of land, and a comparison of the purported signature of Felder to said deed, with the

purported signatures of the witnesses to said deed, standing alone is sufficient to convince any jury in the land that they were written by the same person and of the spuriousness of the Veatch deed.

Respondents say that John A. Veatch was proven to be a man of "sensitive honor and jealous of his reputation." The evidence in Texas on this point came from the mouths of those who were mere children at the time Veatch left the country, and even if Veatch's real character was known, they were not in position to be familiar with it. Besides, it was shown that there were two men in Texas by that name—one John A. Veatch and the other John A. Veitch—and it is not altogether clear as to which of the two men the witnesses refer. As to the evidence from the California witnesses we would say that it is a noteworthy fact that some men bear a better reputation in the State to which they go, than in the State from whence they come.

As stated, on March 15, 1841, Veatch conveyed this league of land to James Morgan, Secretary of the Navy of the Republic of Texas, and a man of unimpeachable integrity and high character as stated by Respondents. And we stand upon our original statement, that said Morgan (Respondents' ancestor) refused to claim under the Veatch deed and that this record shows that Morgan lived in the vicinity of the land in question, and in the vicinity in which the deed from Felder to Daniel was recorded for twenty-five years, yet asserting no claim of ownership thereof, and this in the face of the active claim being at all times asserted by Thomas J. Word and Judge George F. Moore.

True, there is in evidence what is claimed to be a deed never acknowledged nor recorded dated October 17, 1844, from James Morgan to W. D. Lee. Under this deed, John A. Walker was suing for 1850 acres of the Felder league (but not a part of the land in controversy) as stated by Respondents. But Walker failed to recover in his suit, and the record may be searched in vain for any activity upon the part of Walker claiming said 1850 acres. Bear in mind that the heirs of Morgan on the trial of this case do not stand sponsor for the alleged deed from Morgan to Lee, and do not offer it as a muniment of title in this case.

They next say that James Morgan, by deed dated November 21, 1844, conveyed the northern portion of the Felder league (the identical land now in this litigation) to W. W. Swain. The record of this deed was not offered in evidence by the heirs of Morgan, Respondents' statement to the contrary notwithstanding. The record of the deed was offered by Petitioners for the purpose of showing outstanding title. And was offered by the heirs of Goodrich in an attempt to deraign title thereunder. But the Trial Judge found as a fact, and there is no complaint of such finding from any of the Respondents, that the deed from Morgan to Swain was not executed. Why is this true? Because had the Trial Court found that such deed was executed, he could not have given Respondents judgment for the whole of the property in controversy, but only for 1721 acres, as we have fully explained in our brief in support of petition for writ of error. So that the statement in the Respondents' motion that said deed was established is wholly without any support.

Respondents refer to the purported claim by the Goodrich heirs and to alleged conveyances under which they hold. This cannot avail Respondents because the judgment in the Court below was for the heirs of James Morgan (the other Respondents recovering by reason of an agreement between them and the heirs of James Morgan entered in upon the trial of the cause). And the alleged conveyances in the Goodrich title are not assertive of the claim of the heirs of James Morgan, but are antagonistic to such claim.

But if such conveyances mentioned by Respondents are considered as a claim in support of the title of Respondents, then we wish to refer particularly to such conveyances which show that they are quit claim deeds and recite only nominal considerations. We wish to refer particularly to the testimony quoted in Respondents' motion, to the effect that the wife of Goodrich burned the title papers evidencing their claim.

So, we have this case presented, that not only is there non-claim upon the part of James Morgan and his heirs for more than seventy years, as we have detailed in our original brief, but those of the Respondents who claim to deraign title under Goodrich are in no better position, in that there has been no active claim by them for more than forty years until the filing of this suit, and they come into this Court with the statement that their mother—not accidentally, but with the purpose of so doing—burned whatever title papers they may have had reflecting their claim thereunder.

But all this discussion and all these various claims but emphasize what we are contending for in this case:

that the issue of the execution not only of the deed from Felder to Daniel, under which Petitioners claim, but the issue of the execution of the deed from Felder to Veatch, under which Respondents claim, should have gone to the jury. The more Respondents argue, the more clearly it seems to us they make it, that all these questions were questions of fact for the jury and that these Petitioners have been deprived of their constitutional right of trial by jury by having them taken away from the jury.

Respondents claim that it is an historical fact that much confusion, doubt and uncertainty prevailed in the administration of the laws in the Southern States in the years immediately following the Civil War, and give that as an excuse for the failure of James Morgan to assert claim or to object to the claim being asserted by those under whom Petitioners claim. As has been clearly pointed out, the deed from Veatch to Morgan is dated March 14, 1841. Morgan died about 1866, so that his failure to claim is not explained by the conditions following the Civil War.

Neither do such conditions explain why the executors of Morgan, acting in a fiduciary capacity, permitted the suit which they instituted against Judge George F. Moore to be dismissed for want of prosecution, because that case remained on the docket from the time it was filed in 1872 until 1885, plenty long for such executors to have prosecuted it to final determination had they desired to do so despite conditions mentioned by Respondents, if those conditions prevailed. The statement made by Respondents relative to this suit may convey the impression that Judge George F.

Moore did not contest that suit. On the contrary, he did contest the suit, and the depositions of T. J. Word which were used **by agreement** in this suit were taken on behalf of Judge Moore in that old suit, and Judge Moore was represented in that suit by his attorneys, and the case was prepared for trial by the taking of depositions of Word, and otherwise.

Respondents say that those claiming under the Veatch-Morgan deed "again and again convey portions of this land as their property." This statement is of the most inconsistent nature imaginable, because if Morgan or his heirs have conveyed this property, they were not entitled to the judgment which they recovered in the Court below. This position is unanswerable. There can be no support of the recovery which was had in the Court below except on the theory that James Morgan never conveyed the land in controversy in this suit, and that the Morgan heirs who recovered the judgment in the Court below inherited same or took same by devise from Morgan.

Again, it is said:

"There is no pretense or claim that Petitioners or those under whom they claim, either by themselves or through tenants, ever had any possession of any kind of this land prior to 1894, when occasional acts of depredation were committed by them in removing sand and cutting timber."

In our original brief (pp. 36 to 50), in support of petition for writ of certiorari we quote the testimony of Thomas J. Word and the evidence supporting the various acts of possession had by him and by Mrs. Moore, wife of Judge George F. Moore, during the time they

were claiming the land. To this we refer without consuming the time of your Honors in repeating it here. The record, to which suitable reference is made, will be found to support the statement. Likewise, the evidence is set forth showing the acts of ownership and possession of John P. Irvin, the vendee of Word and Moore, and of the Texas Pine Land Association to whom Irvin conveyed, and of the Houston Oil Company of Texas to whom the Texas Pine Land Association conveyed. It will be seen that during the time of Irvin's ownership he kept in his employ a timber scout whose business it was, and who did, **ride the lines** of this tract of land and others owned and claimed by Irvin. The authorities are uniform that the occupancy and use of a tract of land should be that to which it is adapted. It is not expected that brick buildings and "skyscrapers" will be erected upon timber land in the forest. It is only expected that the owner will use the property in the way it is best capable of being used.

Respondents refer to the sand mining operations of the Texas Pine Land Association on this property as "occasional acts of depredation." Our answer to this, your Honors, is to ask that you refer to the four photographs of this sandpit sent up with the record in this case, and to reflect that between January, 1894, and October, 1902, there were approximately 6000 cars of sand—or an average of nearly two cars a day—taken and mined at such sandpit, and from October, 1902, up to the filing of this suit there were, by actual count, 2,742 cars of sand taken. It will be seen, therefore, that the reference above quoted finds no support whatsoever in this record. Petitioners in presenting their

petition for writ of certiorari realized that it was necessary to be brief, and did not encumber their petition by undertaking to quote or even refer to all the evidence in support of the activity of the claim asserted by these Petitioners, but it will be found in the Record.

But Respondents say that when Word went there in 1854 or thereabouts, he found some persons by the name of Hare claiming the right to the ferry on the creek on this league of land, and that Word leased the ferry to them. A ferry in those days was a notorious and public place. There the people from miles and miles around were required to cross the river. What more open claim could Word have made than to have leased to the persons operating this ferry the right to remain on the Felder league? But still Respondents claim that Commodore Morgan, residing in the vicinity, knew nothing of Word's claim. They further insist that the other persons from whom Word took leases were not in possession of the Felder. The record does not bear this out, but the record shows that such persons were living upon an adjoining survey, but had a part of the Felder league under fence, and so remained for a number of years.

We submit that all these facts and circumstances clearly show that either because the deed from Felder to Veatch was spurious and a forgery, or because Veatch took with full notice of the older deed from Felder to Daniel, Commodore James Morgan knowing all the facts asserted no claim or right to this land during his lifetime.

ANSWER TO RESPONDENTS' FOURTH POINT.**Respondents Claim That the Deed
From Felder to Daniel, Under
Which Petitioners Claim, Was a
Forgery.**

They press it upon your Honors that Petitioners have produced no direct proof of the execution of this deed. James Morgan, the ancestor of a part of the Respondents herein, is dead and his testimony cannot be had in support of Petitioners' claim. Felder, who made the deed, is dead. The witnesses thereto are dead. William Myer, who took the acknowledgment, is dead. If property rights hang upon the slender thread of the owners thereof being able to bring direct proof of the execution of a deed, executed three-quarters of a century back, there is no security for property rights. But such is not the law. Petitioners have produced the deed spread upon the public records. They have made search for the original and shown their inability to produce it. Claim under said deed, acts of ownership, and payment of taxes have been shown for seventy odd years. Non-claim upon the part of James Morgan and of his executors has been clearly shown. And the heirs of Morgan, a part of the Respondents herein, have themselves asserted no claim to this land, brought no suit to recover it, exercised no acts of ownership thereon, from the time of Morgan's death in 1866 down to the filing of this suit, and no explanation is made of why they did not do so. During all of that time the active claim of Petitioners was being asserted, and, as above set forth, from 1894 down to the filing of this suit, an

average of one car a day of sand was mined and removed from said land without one word of protest from Respondents.

Respondents argue that the deed from Felder to Veatch, under which they claim, is genuine, and that the deed from Felder to Daniel must, therefore, be spurious, because Felder would not have executed two deeds so closely together. Petitioners can say with the same consistency that their deed from Felder to Daniel is genuine, and that, therefore, Respondents' deed from Felder to Veatch is a forgery and spurious. It was for the jury to decide the question. The Court refused to permit it to go to the jury. Much more can be said in favor of the Daniel deed because of the long, consistent claim under it. It is more reasonable to suppose that one claiming under a forged deed would abandon the deed, and assert no claim, and allow a person claiming under a genuine deed, to claim the property and exercise acts of ownership over the property, than the contrary.

Again, they say that the first decision of the Circuit Court of Appeals settled it that the deed from Felder to Veatch was genuine. All that the Circuit Court of Appeals said upon the first appeal was, that in their opinion the evidence upon the **first trial** was not sufficient to carry the question to the jury. But bear in mind that upon the second trial the evidence was simply overwhelming that the deed from Felder to Veatch was a forgery, in that not only is there no similarity whatsoever between the handwriting in the deed, and the handwriting of Felder in the Land Office, but that not one word of information could be obtained from any

of the old citizens, or from the records of the different counties that there ever was any person by the name of W. B. Barnett or Samuel Palmer, the purported witnesses to the Felder to Veatch deed, who had resided in that vicinity. They were fictitious persons and existed only in the vivid imagination of the person who perpetrated the forgery. It is most unreasonable that two men, and particularly two men whose handwriting indicates that they were educated men, should have lived in the community and should have disappeared therefrom, leaving no trace of themselves, either in the memory of the oldest inhabitants, or upon the various records in the community. The evidence upon the second trial being wholly different from what it was upon the first trial, it cannot, of course, be insisted that the decision of the Circuit Court of Appeals on the first appeal settles anything. If the decision upon the first appeal settled the question as to the Veatch deed, it likewise settled it that the Felder to Daniel deed was duly executed and is valid.

We note, at the bottom of page 39 and the top of page 40 of Respondents' motion, a novel statement of how they claim the forgery of the Daniel deed came about. Bear in mind that such statement does not purport to be from the record, nor to have been made by any witness, and appears to be made by counsel in an effort to explain the unusual circumstance of these Respondents waiting from 1866 (the date of the death of James Morgan) until 1911 before asserting claim to this valuable property—to say nothing of the non-assertion of claim by Morgan himself. We do not understand that we are called upon to discuss visionary suggestions of

counsel as to how a forgery might have been perpetrated in 1839, and particularly is this true when there was no claim by persons, under whom Respondents claim, and who lived at that day and time that such forgeries were perpetrated.

We find this expression in Respondents' motion:

"David Brown was shown to be a notorious crook and land forger. (See testimony of Mrs. Jane E. Jones, R., 669.) This is undisputed. To the unscrupulous schemes of David Brown we can very reasonably ascribe the existence of these fraudulent deeds."

The sole basis of this extraordinary statement is the testimony of this witness given in 1914, seventy-five years after the alleged forgeries occurred, that according to her recollection (and she must have been exceedingly young at the time she claims to have known David Brown) she had heard David Brown referred to as a land forger, etc. Compare the testimony offered in support of the deed from Felder to Daniel with the testimony offered in support of the deed from Felder to Veatch. As stated, no trace could ever be found of the purported witnesses to the Veatch deed. On the other hand, it was shown that persons bearing the names of the witnesses to the Daniel deed, resided in East Texas where the deed was executed about the time of its execution. The signature of Felder to the Veatch deed, to which we have called attention, bears no similarity to Felder's signature when he made his application for this league of land, and the purported signatures of the witnesses bear a striking resemblance to the purported signature of Felder to said deed. Daniel

remained in Texas and under him T. J. Word and Judge George F. Moore deraigned title, which has been the active claim for more than seventy years. Veatch left the country and went to California, and, as has been shown, there has been no active claim under the Veatch deed until the filing of this suit in 1911, seventy-two years after the Veatch deed is claimed to have been executed.

The question of the execution of both deeds should have been submitted to the jury, as it was a question for the jury to determine, and it is idle for Respondents to insist that the testimony is so slight in its probative force as to not justify such submission.

ANSWER TO RESPONDENTS' FIFTH POINT.

It Is Claimed That the Deed From Felder to Daniel Was Not Recorded in Liberty County, and That Even If Recorded Same Would Not Be Notice to Veatch.

The only suggestion contained in Respondents' motion is that because the Menard County record of the Felder to Daniel deed did not show the previous recording of that deed in Liberty County, such deed, therefore, was not recorded in Liberty County. The issue of whether the deed was so recorded in Liberty County was one for the jury (the Liberty County records having been destroyed) and the suggestion of counsel might do to argue to a jury, but it would have no force, from the simple fact that there is no statute

in Texas requiring the Clerk of the second county in which a deed is recorded to place upon the record of such second county, the certificate of Record of the Clerk of the first county where such deed is recorded. And there is no custom shown to that effect. As a matter of fact, there is no such custom and never has been in Texas.

Again, they say that because William Myer was not a notary public the record of the deed in Liberty County would not be notice, and further, because a notary could not take the acknowledgment, that same would not be notice. We have already discussed the flimsy nature of the evidence offered by Respondents from which they desire a finding at this late day that William Myer, who purported to have acted as an officer of the law, was not such officer. As to whether this deed, acknowledged before a notary public, would have been constructive notice if recorded in Liberty County, we call your Honors' attention to our discussion of this matter hereinbefore, in which we clearly point out that the Respondents' own evidence shows that there was a William Myer who was a Justice of the Peace of Jasper County at the time this acknowledgment was taken, and that from among the Justices of the Peace of the county the Associate Justices of the County Court were elected, and that the Associate Justices of the County Court were authorized by law to act as notaries public. So that it is unanswerable that William Myer at the time he took this acknowledgment was an Associate Justice of Jasper County, acting as a Notary Public, and that his act as such is valid, and that the deed when recorded in Liberty County was constructive no-

tice to Veatch. This is a complete answer to Respondents' claim and their complaint that they have not been able to get a discussion of this subject from Petitioners. If we have not referred to it, it was because we regarded it of not sufficient force to call for any attention.

Add to this that if the deed from Felder to Daniel was of record in Liberty County (which, we insist, was true), Veatch in all probability had actual notice thereof, because it was his duty to examine the records of Liberty County to ascertain whether or not Felder had theretofore conveyed the land.

ANSWER TO RESPONDENTS' SIXTH POINT.

The Claim That There Is No Evidence to Show That Veatch Was Not an Innocent Purchaser for Value Without Notice of the Daniel Deed.

This has been fully discussed in our original brief (pp. 75 to 80) and we have pointed out that the active claim under the Daniel deed and the non-claim under the Veatch deed was abundantly sufficient to show that Veatch purchased with notice of the Daniel deed, and that he did not pay value. The only suggestion that Respondents seem to make is that in the deed from Veatch to Morgan he gave a general warranty deed, but this must be considered in the light of the fact that Veatch was leaving the country and did leave the country. In the deed from Daniel to Word, Respondents in-

sist that it is a quit claim deed, but it should be borne in mind that Daniel stayed in Texas and Veatch left.

Reference is also made to the fact that there is a consideration recited in the deed from Felder to Veatch. Naturally, when a deed is spurious and forged, there would be a consideration recited.

ANSWER TO RESPONDENTS' SEVENTH POINT.

The Claim That the Evidence Did Not Justify the Submission to the Jury of the Issue of the Forgery of the Deed From Felder to Veatch, Under Which Respondents Claim.

We find nothing in the discussion by Respondents under this proposition not fully covered by Petitioners' brief (pp. 75-80) in support of petition for certiorari.

Respondents appear to insist that the decision of the Circuit Court of Appeals upon the first appeal and upon the second appeal are *res adjudicata* of the question. The answer to the position is easily found, in that the evidence upon the second trial of the forgery of the Felder to Veatch deed was many times more convincing and unanswerable as to this deed being spurious and forged than it was upon the first trial, and numerous facts and circumstances were presented upon the second trial that were not presented upon the first trial. The balance of the Respondents' complaint under this heading consists of a quotation from the opinion of the Court upon such appeals. We will correct,

however, Respondents' statement as to the nature of the exceptions of Petitioners to the Trial Court's charge to the jury regarding the Felder to Veatch deed. Said exception is, as follows (Rec., p. 805):

"We except to the charge of the Court in that said charge instructs the jury that the deed from Charles A. Felder to John A. Veatch is established by the evidence, and refusing to submit to the jury the issue of the forgery of said deed."

ANSWER TO RESPONDENTS' EIGHTH POINT.

The Claim That the Three Years Statute of Limitation Is Not Applicable.

Respondents have an entirely erroneous view as to the jurisdiction of this Court and to the extent that this Court is bound by the law of the case. The real question in this case is settled by *Panama Railroad Co. v. Napier Shipping Co.* (166 U. S., 280; Law. Ed., p. 1005).

In discussing the facts under the Three Years Statute of Limitation, Respondents overlook or ignore the facts that appear in the record and which are unanswerable, that from 1894 down to the filing of this suit sand was mined continuously from this tract of land, there being an average of one car a day removed during said time, and that upon said premises there were houses occupied by the employes engaged in mining sand, and the house occupied by the railroad pumper (outside of the railroad right of way); also

that the record shows tie camps, wood yards, etc., thereon. It being clear that many periods of three years' occupancy sufficient to support the Three Years Statute of Limitation are shown by the record. We refer to our brief in support of petition for certiorari (pp. 84 and 85; also pp. 34-50).

Under the authorities cited in our original brief (p. 85), there can be no question that the Three Years Statute of Limitation is applicable under claim of title under the senior deed from Felder to Daniel.

ANSWER TO RESPONDENTS' NINTH POINT.

It Is Contended That the Doctrine of the Law of the Case Prevents This Court From Determining the Questions Presented.

It is only necessary upon this point to refer to the case of Panama Railroad Co. v. Napier Shipping Co. (166 U. S., 280; Law Ed., p. 1005), as that case is decisive of the questions raised by Respondents.

A different case is not presented by reason of the fact that **Respondents**, upon the first appeal and after the Circuit Court of Appeals had reversed the case upon the first appeal, applied to this Court for a writ of certiorari. In Respondents' application they only complained of the questions which had been decided **against** ~~them~~ ^{them} by the Court of ~~the~~ Appeals, i. e., that the facts presented entitled Petitioners to go to the jury on the issue of the Five Years Statute of Limitation. So that the Court only passed on that one question and no others.

CONCLUSION.

We respectfully submit that the motion to affirm should be denied. Petitioners have been deprived of their constitutional right of trial by jury in this case. Numerous issues of fact affecting their right have been taken from the jury and decided by the Trial Court. Petitioners are entitled to proper trial of the issues affecting their right and title to this valuable property.

We submit that the motion of Respondents to pass this case to the summary docket should likewise be denied, for the reason that as hereinbefore set forth this case itself involves large property rights and the questions involved, i. e., the validity of the Menard Records and the right to go to the jury upon a deed appearing on such records under which there has been long c'aim, involve vast acres of land worth large sums of money owned by hundreds of citizens of Texas, and the case should take its due course to the end that it may be fully presented by both oral argument and briefs.

Respectfully Submitted,

THOMAS M. KENNERLY,
Attorney for Houston Oil Com-
pany of Texas, Maryland Trust
Company, and Kirby Lumber
Company, Petitioners.

H. O. Head,
W. L. Marbury,
Oswald S. Parker,
Of Counsel.

FILED
FEB 29 1916

RECEIVED
FEB 29 1916

IN THE

Supreme Court of the United States

HOUSTON OIL COMPANY OF TEXAS ET AL.
PETITIONERS,

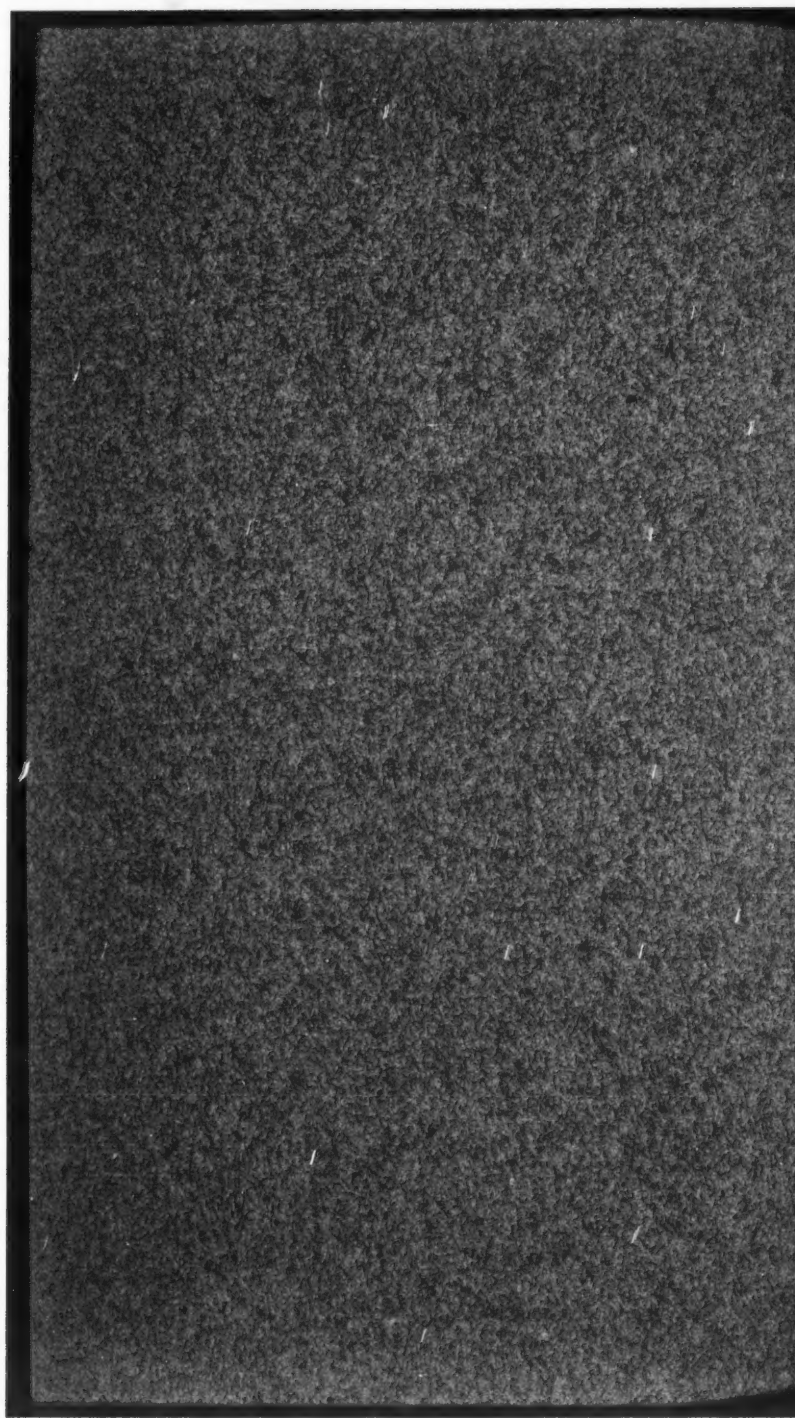
VS.

CORNELIA C. GOODRICH ET AL.,
RESPONDENTS.

RESPONDENTS' MOTION TO AFFIRM.

WILLIAM D. GORDON
Attorney for Respondents.

Of Counsel:
HARRISON M. WHITTAKER,
EUGENE B. EASTMAN,
THOMAS J. BARNY.



SUBJECT INDEX.

	Page.
<i>Motion to Affirm, Grounds</i>	1-4

Supporting Statements:

I.

<i>First Point</i> : Relating to the proof of the William A. Daniel deed and the asserted claim of petitioners thereunder	4-20
<i>Second Point</i> : Relating to the claim of petitioners under T. J. Word, beginning in 1855.....	20-23
<i>Third Point</i> : Relating to the assertion of claim of the respondents and those under whom they claim, originating in the deed from Felder to Veatch	23-34
<i>Fourth Point</i> : Relating to the evidence which establishes the forgery of the purported deed from Felder to William A. Daniel	34-41

II.

<i>Fifth Point</i> : Relating to the question as to whether the purported deed from Felder to Daniel was recorded in Liberty County before it was filed for record in Menard County, so as to give constructive notice	42-45
--	-------

III.

<i>Sixth Point</i> : That there is no evidence which shows or tends to show that Veatch was not an innocent purchaser for value	45-47
---	-------

INDEX (Cont'd).

Page.

IV.

Seventh Point: Relating to the assertion of petitioners that the evidence required the submission to the jury of the issue of forgery of the deed from Felder to Veatch 47-54

V.

Eighth Point: Relating to the contention of petitioners that the issue of three years limitation should have been submitted to the jury 54-58

VI.

Ninth Point: Relating to the effect of the decision on the first writ of error as *res judicata* of all issues therein determined 59-62

Conclusion and Prayer 62

List of Authorities Cited.

Cited on
Page.

Act of January, 1839 (Paschal's Digest of the Laws of Texas, Art. 4974 or Hartley's Dig. Art. 2760 5

Act of February 5, 1840 (See Paschal's Dig. Laws of Texas, Art. 4975 or Hartley's Dig. Art. 2768 6-7

Art. 5673, Vernon's Sayles Texas Civil Statutes 54

Belcher vs. Fox, 60 Texas, 529-530 11

Bell vs. Arledge, 135 C. C. A. 347 61

Durant vs. Essex Co., 101 U. S. 555, 25 L. Ed. 961 61

Ellen Lee Mason vs. Houston Oil Company, 173 Fed. R. 1021, 97 C. C. A. 668 —

Gaines vs. Rugg, 148 U. S. 228, 37 L. Ed. 432 61

INDEX (Cont'd.)

	Page.
Goodrich vs. Houston Oil Company, 234 U. S. 761.	—
Grigsby vs. May, 84 Texas, 252-254.....	56
Heintz vs. Thayer, 92 Texas, 663 to 666.....	9
Houston Oil Company vs. Goodrich, 129 C. C. A. 488.	36
Houston Oil Company vs. Kimball, 103 Texas, 94..	10
Holland vs. Nance, 102 Texas, 177.....	47
Hill vs. Taylor, 77 Texas, 295.....	45
In re Sanford Fork & Tool Co., 160 U. S. 246....	61
Joske vs. Irving, 91 Texas, 582.....	41
Kingsbury vs. Buckner, 134 U. S. 671, 33 L. Ed. 1047	61
League vs. Rogan, 59 Texas, 430-431.....	56
Littleton vs. Giddings, 47 Texas, 116.....	37
Mason vs. Houston Oil Co., 173 Fed. Rep. 1021, 97 C. C. A. 668	—
McCarty vs. Johnson, 49 S. W. (Tex.) 1098, 1101..	9
McCelvey vs. Cryer, 28 S. W. (Tex.) 691.....	7
Parker vs. Waycross R. R. Co., 81 Georgia, 387; 8 S. E. 871 (Cited in 13 Cyc. 728).....	37
Riverra vs. Wilkens, 72 S. W. (Tex.) 608	45
Schultz vs. Tonty Lumber Company, 82 S. W. 352.	9
Tyler vs. Magwire, 84 U. S. 283.....	61



No.

IN THE
Supreme Court of the United States

HOUSTON OIL COMPANY OF TEXAS ET AL.,
PETITIONERS,

VS.

CORNELIA G. GOODRICH ET AL.,
RESPONDENTS.

RESPONDENTS' MOTION TO AFFIRM.

*To the Honorable Chief Justice and Associate Justices
of the United States Supreme Court:*

Now come the respondents in the above numbered and entitled cause, and present this their motion to affirm this cause without further argument; or, in the discretion of the court, to advance the cause to the summary docket for speedy disposition.

And as grounds for this motion, the respondents respectfully show the court as follows:

The petitioners, in invoking and procuring the exercise of the jurisdiction of this court in the granting of

the writ of *certiorari*, have misrepresented the facts in their petition for the writ.

And these respondents respectfully show that the questions so raised by the petitioners, on which the decision of this case depends, in actuality are so groundless when viewed in the light of the true facts reflected from the record that it is manifest that said writ was ~~afforded~~ ^{obeyed for} for delay only. And they say that the result reached in the trial court and in the Circuit Court of Appeals for the Fifth Circuit affirming the lower court is so obviously correct, viewed in the light of the true facts, that the contentions of the petitioners are so frivolous as not to need further argument.

I.

If the suggestion should arise that an answer ought to have been presented to the original petition for writ of *certiorari*, respondents say their excuse is this:

On account of the fact that this Honorable Court rarely grants the writ in cases where the jurisdiction rests solely upon diversity of citizenship in controversies of a purely private nature, counsel deemed it unnecessary to file a reply to the petition exposing to the court the misrepresentation of facts made as the basis for the petition; for such answer would require the charge to be made (which we now regretfully make) that the ultimate facts relied upon in said petition were not to be found in the record, but were supplied out of the zealous imagination of counsel, inducing the inference to be drawn by this Honorable Court that the lower courts, having four

times denied their contentions in passing on the facts of this case, had violated well known principles of law and denied the petitioners their constitutional right of trial by jury. Another reason is that the Circuit Court of Appeals on the former writ of error had determined the law of the case in favor of respondents on all questions except as to the five years statute of limitation, which the lower court was directed to submit to the jury.

It is now with great reluctance that counsel preparing this motion record the charge that opposing counsel have presented a petition to this court misrepresenting the facts of the case in the specifications of error invoking the action of this court.

The first specification affirms that petitioners de-rain title under a deed from William A. Daniel. In truth and in fact there is no evidence in the record to sustain this assertion.

The next statement in this specification is that said deed to William A. Daniel has remained unchallenged and supported by a consistent claim of title thereunder "for more than seventy years." And on page 10 of the petition this language is used :

"Petitioners and their predecessors in title have claimed under this deed since 1839—more than seventy years."

This statement is utterly without support in the record, and is affirmatively shown to be untrue.

The next statement in this specification is that no claim has been asserted upon the part of the respondents and their predecessors in title "during said period."

This statement is likewise wholly untrue and without any support whatever from the record.

Having recited these statements as true (when they are not true in any respect), the specification of error lays down the following:

"Such facts were sufficient to entitle petitioners to have the issue of the execution of the deed from Felder to Daniel submitted to the jury, and the court erred in refusing to so submit it."

Respondents will now review all of the facts in the record upon these points, and demonstrate to this Honorable Court the truth of the averments here made in criticism of the petition upon which the writ was granted:

FIRST POINT.

(Relating to the proof of the William A. Daniel deed and the asserted claim of petitioners thereunder.)

(1) There was no legal evidence that Charles A. Felder ever deeded the land in controversy to William A. Daniel, or that William A. Daniel ever asserted the slightest claim of ownership to the land during his lifetime, or that anyone under him has ever asserted any claim of ownership since his death.

(2) The petitioners are not connected with the purported deed from Charles A. Felder to William A. Daniel. The petitioners' sole claim of connection rests upon a quit claim deed from William Daniels, who was a different man, with no relationship to William A. Daniel, made five years after the death of William A. Daniel, for a recited consideration of \$100.00, and purporting to quit claim three leagues of land, including the land in controversy.

Petitioners offered in evidence, the old record book purporting to be a record of Menard County, containing what purported to be a copy of a deed signed CHARLES FELDER, and purporting to convey to William A. Daniel, four thousand four hundred and twenty-eight (4428) acres of land, describing the land as "commencing on the west bank River Neches, and running thence west" without fixing any point on the west bank of the river for beginning.

The instrument does not undertake to convey the Charles A. Felder league of land by name, but after giving metes and bounds, concludes the description as follows: "It being the league of land granted George A. Nixon, Commissioner of Zavalla Colony, on 29th of August, 1835." The name "Charles A. Felder" was written in the face of the deed, both in the granting and warranty clauses, and the certificate of acknowledgement contained the name "Charles A. Felder" (R. 340-1). The acknowledgement purports to have been taken before William Myers, a notary public, Jasper County (R. 342), who was not a notary public on that date. See certificate from the office of Secretary of State (R. 366-7-89). And if William Myers had been a notary public, he was not under the law then in force, authorized to take acknowledgements of deeds conveying land.

Act of January, 1839: "It shall be the duty of the clerks of the county courts to record all deeds, conveyances, mortgages, and other liens, affecting the titles to land and immovable property, situated within the same, which shall be presented to them

for record; provided, one of the subscribing witnesses shall swear to the signature of the signor, or he himself shall acknowledge the same; which proof or acknowledgment shall be made before some county court, or chief justice of the same, or before the clerk in whose office such instrument is proposed to be recorded, a certificate of which shall be made upon such instrument by the proper officer, and become a part of the record. And all laws contrary to or conflicting with this act be, and the same are hereby repealed, so far as they conflict with, or are contrary to the same."

See Paschal's Digest of the Laws of Texas, Art. 4974, or Hartley's Dig. Art. 2760.

By the Act of February 5, 1840, which took effect 16th March, 1840, for the first time a notary public was authorized to take proof or acknowledgment of deeds. This act is as follows.

"The clerks of the several county courts of the republic and their deputies shall be, and they are hereby authorized and required to admit to record at any time, in the form required by this act, any conveyance, either on the acknowledgment of the party or parties, or the proof, on oath, of such acknowledgment by the legal number of witnesses thereto made, in the offices of the respective clerks; or upon the certificates of some district judge or chief justice, or *notary public* of a county, with the seal of his office thereunto annexed, that such *acknowledgment* was made, or the execution of the instrument proven as required above; and any conveyance so recorded shall have the same legal validity, in all respects, as if it were proven in open court" (*italics ours*).

See Paschal's Dig. of the Laws of Texas, Art. 4975.
Hartley's Dig. Art. 2768.

If any decision were necessary to show the correctness of our position under so plain a statute as that of 19th January, 1839, quoted above, it is afforded by the case of *McColey v. Cryer*, 28 S. W. (Tex.) p. 691.

The deed is copied in the record as "Daniels," but it was admitted by opposing counsel that "in the original record it is copied William A. Daniel" (R. 344). It was duly attacked as a forgery (R. 51).

This purported deed to William A. Daniel, more than two and one-half years after its date, on the 23rd February, 1842, was recorded in the unconstitutional county of Menard (R. 342).

The fact that this deed was so long in finding its way to this record, is within itself an evidence of suspicion against rather than *bona fide* claim.

We will now show that the copy of the above instrument found on the books of the pseudo county of Menard, was not a lawful record, but void and of no more effect than if such copy had been found on the fly leaf of some man's family bible.

This is done to set at rest any possible claim which has been made by petitioners that such was a regular and valid record (Petition pp. 34 *et seq.*).

Menard County was a void subdivision, made by an Act of the Texas Congress, as held by the Supreme Court of Texas. This holding invalidated of course all the Menard Records.

Subsequently in 1844, Congress passed an Act validating, not all, but certain of the Menard records, to-wit: "All deeds and other instruments of writing which have been *proven before the proper officers* of justice of such districts, or *other legal officers*" (italics ours) (see Act quoted pages 33-35 of petition).

The Circuit Court of Appeals in this case, construing the effect of this validating act upon this particular record, said:)

"The instrument in question did not purport to have been so proven; the acknowledgment of it having been taken before a Notary Public, an officer who at the time the deed purported to have been made, did not have authority to take acknowledgments of conveyances of land" (226 Fed. 435; *McClevey v. Cryer, supra*).

This holding is obviously correct, and there is no decision in Texas to the contrary. The cases cited by opposing counsel deal with those instruments which had been duly acknowledged before the proper officers, and not with instruments, such as this, which were not so proved or acknowledged.

The court below, therefore excluded on objection a certified copy of this Menard record "as muniment of title" (R. 360). And this action is not complained of by any specification of error.

The Menard record is only a *circumstance* tending to show that such a paper once *existed*. Whether it was a genuine instrument executed by the purported grantor, must be shown by other evidence.

In the case of *McCarty v. Johnson*, 49 S. W. (Texas), 1098, 1101, it is held:

"In a country where titles are expected to be registered, the first place where trace of a lost deed is sought is among the records. If the record of the deed be regular, the statute gives to it a certain effect, which it cannot have if it has not been duly made. If it be not regular, it does not follow that its existence may not be a circumstance legally admissible as *tending to show that the thing copied also had a real existence*. Whether it was a genuine document or not, is still open for investigation, and may be resolved by other circumstances" (*italics ours*) (see also *Heintz v. Thayer*, 92 Texas, 663 to 666).

Such was the view of the law taken by the courts below. *And because there was no other evidence which showed or tended to show the genuineness and execution of this deed*, the trial court did not submit to the jury the issue as to its execution. In this holding, the trial court was clearly in line with Texas decisions (*Schultz v. Tonty Lumber Company*, 82 S. W. R. 352, and cases cited).

To sustain their specification of error on this point, petitioners boldly assert that there has been an active and continuous assertion of title under this Daniel deed (the sole evidence of which was the Menard record above referred to) for more than seventy years, and non-claim on the part of the respondents and those under whom they claim for the same period of time.

Both of these statements are wholly unsustained by the record, and are directly contradicted by it, and to that we will appeal in proof of this assertion:

(a) *We will now consider first whether there were any acts or claim on the part of Charles A. Felder, the purported grantor in said deed, or on the part of William A. Daniel, the purported grantee, which show that the one had conveyed the land and the other had taken a conveyance of it.*

It is the acts and conduct of *these parties* as the Texas courts have held which throw light upon the subject, and not the acts of those claiming the land many years afterwards (*Houston Oil Company v. Kimball*, 103 Texas, 94, 103).

The affirmative acts and conduct of Charles A. Felder, the purported grantor in the spurious deed to William A. Daniel, indicate and loudly proclaim, that he made no such deed, because eight days after its purported date, he does make a deed to the same land to John A. Veatch (R. 67), which has been abundantly shown to be a genuine instrument, and delivered with his deed the *original* testimonio of his grant.

As to William A. Daniel, what are the facts? We assert that there is not a scintilla of evidence in the record that he, by word or deed, or otherwise—ever at any time asserted any title to, or ownership of this land. Neither he nor his legal representatives have ever conveyed it away. And it now stands after more than seventy-five years without the slightest sign or indication that they claim or have ever claimed this land.

Notwithstanding this fact, petitioners boldly assert that there has been an active, continuous and unchallenged claim to this land by William A. Daniel, and those claiming under him, "for more than seventy years" with non-claim on the part of the respondents, and those under whom they claim, for the same length of time. And they emphasize the time by putting it in bold black capitals. That this long and active claim was shown by the payment of taxes, cutting of timber, mining of sand and possession by tenants.

Did William A. Daniel ever pay any taxes on this land? If he did the record fails to show it. Did he ever cut any timber on it? No. Did he ever mine any sand on it? No. Did he ever occupy it himself or through tenants? No. Did he ever undertake by deed or otherwise to convey any part of it? No. Did he ever *do anything* to indicate his claim to or ownership of this land? If so, we challenge the petitioners to point out the fact in the record.

It is not what was done in these latter years under T. J. Word, but the acts and doings of the parties immediately connected with the transaction whose genuineness is to be proved, that constitute evidence as to a conveyance from Felder to Daniel.

In the case of *Belcher v. Fox*, 60 Texas, 529-530, Associate Justice Stayton, speaking for the court, says:

"The plea of *non est factum* filed by the appellants, put the burden of proving the execution of the several deeds named in it upon the appel-

lees, and it becomes necessary to inquire whether the deeds were so proved as to justify the court in permitting them to go to the jury.

"The land is situated in Navarro County.

"The deed purporting to have been made by E. H. Belcher to Massie, bears date July 13, 1849; that from Massie to Wilson bears date April 3, 1850; and that from Wilson to Jordan, December 4th, 1850. The original deeds were not produced, affidavit of their loss having been made by agreement the deeds were read from the record of deeds from Navarro County, subject to all legal objections which could be raised to the originals had they been produced.

"These deeds were recorded in Navarro County in 1870; all had subscribing witnesses who are shown to be dead, and purport to have been proved for record by some of the witnesses as early as March 16, 1853, this being the date of the proof for record of the last deed named.

"The land was patented to E. H. Belcher, the father of appellants, on September 22, 1862, and he died on October 26, 1865. The deeds all purport to have been proved for record before James McWilliams, County Clerk of Rusk County, or his deputy.

"The only evidence offered by the appellees of the genuineness of the attacked deeds, if that be any evidence, was that the persons whose names appear as subscribing witnesses to the deeds, as well as the officers before whom they purport to have been proved for record, were dead, and that they were persons of good reputation, resident in Rusk County at the time the deeds bear date, as was also E. H. Belcher.

"It further appears from the testimony of a witness that he located the land in controversy for F. N. Hanks, who claimed by a deed made to him

by Jordan of date March 9th, 1855, the execution of which was proved; but the records of the surveyor's office showed that the person who made the location made it for another person than Hanks. The location was made October 26, 1861.

"From a certificate copied into the record of the paper purporting to be a deed from E. H. Belcher to Massie, it would appear that the deed was recorded in Rusk County on September 29, 1849, but there is no evidence whatever that the deed in fact was so recorded. Hanks conveyed to Peak, December 7th, 1864, but the deed was not recorded until May 20th, 1870. Peak conveyed to the appellees in June, 1875.

"The testimony of several witnesses seems to have been introduced without objection, which, it is admitted in the record, proved that the reputation of Hanks as a land dealer was bad. The appellants objected to the admission of the deeds, the execution of which was denied, upon the ground that they were not sufficiently proved, and also moved to strike out the deeds after they had been read from the record, and the action of the court in admitting and retaining the deed is assigned as error.

"We are of opinion that the assignments of error based upon those matters are well taken. There was certainly no such proof of the execution of the deeds as the law requires. The original deeds were not produced, and strong must be the corroborating facts to authorize the holding that a deed even thirty years old is genuine when the original is not produced, and a copy from the record, or the record, is relied upon to show even the existence of the paper. Such proof, at best, is but secondary. When the deed itself is introduced, coming free from suspicion, and from the proper custody, even then facts corroborative of

its ancient existence and genuineness must be proved. *Stroud v. Springfield*, 28 Texas, 663; *Newby v. Haltaman*, 43 Texas, 317; 1 Greenleaf, 570; 1 Wharton's Evidence, 732, 733; Starkie on Evidence (9th Ed.), 521; *Holmes v. Coryell*, 58 Tex. 685.

"When acts are relied upon as corroborative, they should be such as are contemporaneous with the life of the person who is claimed to have executed the instrument, if he lived for many years after the apparent date of the instrument, if not nearly contemporaneous with the date of the original instrument itself, be open in their nature, and such as evidence a clear claim of title consistent only with such an instrument as is claimed to have been made; the mere existence of the instrument is not enough. There was no such evidence in the case as showed with reasonable certainty that two of the deeds recorded in Navarro County in 1870 had an existence long before the time they were filed for record, nor any claim to the land was ever openly made during the life of E. H. Belcher." (Italics ours.)

We refer the court also to the case of *Houston Oil Company v. Kimball*, 103 Texas, 103.

In that case a deed which had been executed by O. C. Nelson, the original grantee of the land involved, to Parmer, was charged to be a forgery. Some of the evidence on which claim was made, was that Barnes and Kimball, who had acquired Parmer's title, had shown no claim to said land for many years. This non-claim on the part of Barnes and Kimball was claimed to be a circumstance in proof of the forgery of

the deed from Nelson to Parmer. As to this, the court says:

"The long continued non-claim on the part of Barnes and Kimball are urged also as circumstances from which the fact of forgery might be presumed, but we deem it unnecessary to argue that proposition, *for surely counsel would not contend that the action or non-action of persons who had no part in the execution of the instrument could be taken as evidence of the fact that Parmer committed a forgery in securing the deed from Nelson.* We are of opinion that there was no evidence before the jury which would justify the court in giving the charge requested." (Italics ours.)

And so the court holds that the facts which tend to prove or disprove the execution of a deed are the acts and conduct of the parties immediately connected with the transaction, and not the action or non-action of parties long subsequent in the chain of title. Surely then the acts of claim of those holding under T. J. Word, who did not connect with William A. Daniel would not be admissible as evidence bearing on the execution of the deed from Felder to Daniel.

(b) *We will now proceed to show from all the evidence, that petitioners were not connected with the purported deed from Charles A. Felder to WILLIAM A. DANIEL, of June 10th, 1839. The undisputed evidence being that William A. Daniel, the purported grantee in that deed, had been dead five years before the making of the quit-claim deed of February 5th, 1855, by WILLIAM DANIELS to T. J. Word, under which petitioners assert title.*